SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 893

R. P. HUNTER, PETITIONER,

vs.

TEXAS ELECTRIC RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

No. 52920

R. P. HUNTER

vs.

TEXAS ELECTRIC RAILWAY COMPANY

To the Honorable the Said Court:

FIRST AMENDED ORIGINAL PETITION—Filed July 2, 1945

Now come- R. P. Hunter, plaintiff in the above numbered and styled cause, complaining of Texas Electric Railway Company, defendant, and leave of court being had files this his first amended original petition, in lieu of his original petition filed herein, and for same says:

That the defendant is a corporation, duly and legally incorporated under and by virtue of the laws of the State of Texas, as a common carrier of passengers and freight for hire, owning, maintaining and operating a line of railway into and through Grayson County, Texas, and into and through, and between, the cities of Sherman, and Denison, in Grayson County, Texas. That said defendant has heretofore been cited to appear and answer herein, and has answered herein, and further service herein is unnecessary. For cause of action, plaintiff alleges:

I

That heretofore, to-wit, on the 2nd day of May, A. D., 1944 the plaintiff was an employee of the defendant, and the relationship of Master and Servant existed between said plaintiff and defendant; that plaintiff was a motorman on one of defendant's interurbans, operating between Sherman and Denison, Texas. That the defendant at all times mentioned and to be mentioned in this petition was engaged in interstate commerce and interstate transportation; and in the alternative, *and in the alternative*, only was engaged in intrastate commerce.

II

Plaintiff further alleges, that on or about said *said* date he was operating one of defendant's cars Northward between Sherman and Denison, about one-half mile North of the station at Woodlake in Grayson County, Texas, when a Southbound car, belonging to the defendant, and being operated by one of defendant's agents, servants and employees, crashed into the car being driven by this plaintiff, causing serious bodily injuries to the plaintiff, as will be [fol. 10] hereinafter shown.

Plaintiff would show to the court that said head-on collision, and each and all of plaintiff's injuries and damages alleged and to be alleged in this petition were directly and proximately brought about and produced and were the proximate result of the acts of negligence on the part of the defendant, its agents, servants and employees, acting within the scope of their employment, and the driver of the Southbound Interurban, to-wit, T. N. Maxwell, as follows, to-wit:

(a) Defendant negligently failed to maintain a block or signal system or signal device at the point to the South of the place where said collision occurred, to inform defendant's motorman, and this plaintiff, of on-coming cars, and of the necessity of side-tracking to avoid a collision.

(b) Defendant negligently failed to provide plaintiff with an order to hold the car which he was operating for the approaching and passing of the Southbound Interurban.

(c) The system the defendant employed in the matter of the passing of the North and Southbound cars between Sherman and Denison, at the hour of the day at which this collision occurred, under all the circumstances, constituted negligence in this: That the time of the passing of the said two cars was the only time during the day, at which one car should be side-tracked at Woodlake, and the schedule provided that the operators of said cars at said time should be governed by whether or not, the other car was standing on the tracks at Woodlake. This left same to the vag-ries of the memory of the operator of said cars, when a system could and should have been provided for the information of the operators of said car at said time, either by a signal device, block signal or by written order.

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(e) That the car being operated by the said T. N. Maxwell was being operated with insufficient and defective braking apparatus, negligently.

(f) That the defendant was negligent at said time in maintaining insufficient machinery for the cutting off of the power of the Southbound Interurban.

(g) That as he approached the point of collision, the driver of the southbound car, negligently failed to apply [fol. 11] brakes on said car.

(h) As he approached the point of collision, the driver of the southbound car, negligently failed to stop said car before it reached the point of collision.

(i) As he approached the point of collision, the driver of said southbound interurban, negligently jumped from said interurban and left same running wild.

(j) As he approached the point of collision, the driver of said southbound interurban, negligently failed to slow said car down before it reached the point of collision.

(k) As he approached the point of collision, the plaintiff was in a position of peril; that the driver of said southbound car discovered plaintiff's peril in time to have avoided the collision by the use of all reasonable means at his command; that the said driver failed to use all reasonable means at his command commensurate with his safety and the safety of the passengers riding with him; that such failure on the part of said driver was negligence; and such negligence was the direct and proximate cause of the collision and the resulting injuries and damages sustained by this plaintiff.

That each and every act of negligence, acting separately and concurrantly, directly and proximately caused said collision and all the personal injuries and damages sustained by the plaintiff.

III

Plaintiff alleges that by reason of said collision- sustained fractures to the bones in his left leg in five places; that his knee cap on said leg was split; that each ankle bone in said leg was broken in two places; that he sustained bruises, sprains and strains to his left side, hip and back; to his left arm, from the shoulder to the elbow, and his right shoulder in the back. That he sustained serious shock to his entire nervous system.

That he sustained injuries to his chest and heart resulting in an ever recurring and fatal heart ailment.

That he has suffered much mental anguish and physical pain, and will continue to so suffer throughout life. That each and all of said injuries are permanent.

[fol. 12] IV

Plaintiff further alleges at the time that he was injured he was a well, able-bodied man, fifty-nine (59) years of age, capable of earning and did earn the sum of one hundred ninety-five dollars per month. That in addition to said sum he performed work around the house and yard, of the value of a further sum of five hundred dollars per year.

That his earning power has been destroyed, and in the alternative, materially diminished.

V

Plaintiff would further show to the court that he has been compelled to and has expended sums of money for medicines, hospitals, doctors and nurses, in the sum of five hundred dollars; that he will be compelled to expend sums in the future to the probable extent of five hundred dollars.

That by reason of the premises plaintiff has been damaged in the sum of twenty-five thousand dollars.

Wherefore, premises considered, plaintiff prays on final hearing hereof for judgment against the defendant in the sum of twenty-five thousand dollars, together with interest thereon, at the rate of six per cent per annum from date.

He prays further for costs of suit and for general relief.

Spearman Webb & O. H. Woodrow, Attorney for Plaintiff.

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[fol. 13] IN THE DISTRICT COURT OF GRAYSON COUNTY, TEXAS, FIFTEENTH JUDICIAL DISTRICT.

[Title omitted]

ORIGINAL ANSWER—Filed August 3, 1944

To the Said Honorable Court:

Now comes the defendant, Texas Electric Railway Company, and files this its original answer.

I

It denies all and singular the allegations contained in plaintiff's original petition, and demands strict proof thereof.

Wherefore, having fully answered, defendant prays that it go hence without day, and that it have judgment for all costs hereof.

Freeman & Wolfe, Attorneys for Defendant.

[fol. 14] IN THE DISTRICT COURT, 15TH JUDICIAL DISTRICT, GRAYSON COUNTY, TEXAS.

[Title omitted]

FIRST AMENDED ANSWER—Filed July 11, 1945

The defendant, Texas Electric Railway Company, with due leave of Court, files this its First Amended Original Answer to plaintiff's First Amended Original Petition, filed July 2nd, 1945, as follows:

I

It denies all and singular the allegations contained in plaintiff's First Amended Original Petition, and demands strict proof thereof.

II

1. It denies that it was either necessary or proper to maintain a brock or signal system or signal device at a point South of the place where the collision in question occurred, and says that the plaintiff was not mislead or

caused to do any act or thing he would have done in the event there had been such block or signal system, for the following reasons:

The plaintiff had been in the service of the defendant and engaged in the operation of its motor cars for many years. There had been established and the plaintiff well knew that there was a switch or crossing where the north bound cars and the south bound cars could and did pass each other a short distance south of the point of collision, to-wit: near the station known as Woodlake. A well-established and thoroughly promulgated rule of defendant, well known to the plaintiff, required that north bound cars remain stationary at Woodlake until the south bound car had passed the said switch and proceeded southward. On this occasion the south bound car had not reached the said meeting point, and it was the duty of the plaintiff, as he well knew, to await the arrival and passage of the said south bound car at said point. It was his duty to do so, but in violation of that duty, with that information thoroughly known to him, and with the knowledge of all the circumstances of which he is charged with knowledge that the south bound car was approaching, he propelled the car he was driving northward on defendant's track until a [fol. 15] collision between the car he was operating and the car being operated by Maxwell was unavoidable because of a curve in the company's track. Plaintiff was familiar with the said curve, knew of its existence, and knew, or was charged with notice of the danger of approaching said curve at the point of said collision.

2. The defendant denies that it failed to provide plaintiff with an order to hold the car which he was operating for the approaching and passing of the south bound interurban, but says it was a general order, oral and well known to him, and printed and in his possession, requiring him to remain at the Woodlake station until the south bound car had passed. It avers that the plaintiff, with full knowledge that it was his duty to *do* remain at Woodlake, negligently and improperly violated his instructions and orders, and that in so doing, he was guilty of negligence which of itself was the sole, proximate cause of the collision in question and the injuries sustained by him in said collision.

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3. It especially denies that the system the defendant employed in the matter of the passing of north and south bound cars between Sherman and Denison at the hour of the day at which this collision occurred was negligence, and says that the duty of the plaintiff to remain at Woodlake until the south bound car passed was well known to him, that the same was flagrantly violated by him, and that his said violation of said well known regulation was of itself sufficient to constitute the sole, proximate cause of the injury he received.

4. It especially denies that the car being operated by Maxwell, which collided with the car being operated by the plaintiff, had insufficient or defective braking apparatus, but says, on the contrary, the said braking apparatus on said car was in good and proper order.

5. The defendant denies that it was negligent at the time in question in maintaining insufficient machinery for the cutting off of the power on the south bound interurban, but avers on the contrary, that the said south bound interurban car was well equipped with adequate machinery and means for cutting off the power thereof.

[fol. 16] 6. The defendant especially denies that as Maxwell approached the point of collision he failed to apply the brakes on the car driven by him, and says, on the contrary, that Maxwell did properly and carefully apply the brakes on the car he was operating as soon as he saw, or could have seen, the approach of the car the plaintiff was operating.

7. The defendant denies that Maxwell was guilty of negligence in failing to stop the car driven by Maxwell before it reached the point of collision. On the contrary, the said Maxwell did on said occasion, at the proper time and by proper means, endeavor to stop the car driven by him before it reached the point of collision.

8. It is true that as the car driven by Maxwell approached the point of collision, the said Maxwell discovered that the plaintiff was in violation of the existing rules and regulations in negligently propelling the car he was driving along said track northward, and when Maxwell discovered the approach of the north bound car thus caused by the

plaintiff's negligence, the said Maxwell immediately and as soon as he had sufficient knowledge to warrant him and require him to do so, did everything within his power to stop the advancement of the car Maxwell was driving, but after the said Maxwell had done everything he could to stop the car and avert the collision and the consequent danger to him caused by the plaintiff's negligence in operating the car northward at the time and place, the said Maxwell did jump and was warranted in jumping from the car to save, so far as he could, his life or personal injury to him brought about solely by the plaintiff's negligence.

9. The plaintiff was guilty of negligence in operating the car northward beyond the Woodlake station at the time and under the circumstances he did, and his said negligence of itself was sufficient to constitute the sole, proximate cause of any injury the plaintiff sustained in the collision.

10. It is true that the plaintiff had placed himself by his own negligence in a position of peril at and immediately preceding the time of the collision, but it is not true that Maxwell, the driver of the south bound car, discovered [fol. 17] plaintiff's peril in time to have avoided the collision of the two cars by the use of any means then at his command. It affirmatively avers that the said Maxwell did as soon as he discovered the approaching north bound car and the danger resulting therefrom, use all the means then within his power to stop the car he was driving southward and prevent the collision, but all the effort he could and did assert in that direction was insufficient to prevent, and did not prevent, the collision.

11. The plaintiff himself was guilty of negligence as above specified, and the said negligence of the plaintiff separately and concurrently was the sole, proximate cause of the collision of the interurban cars and any injuries sustained by the plaintiff as a result thereof.

Having fully answered, it prays that it go hence without day, and that it have judgment against the plaintiff for all costs hereof.

Freeman & Wolfe, Alexander Gullett, Attorneys for Defendant.

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[fol. 18] IN THE DISTRICT COURT, 15TH JUDICIAL DISTRICT, GRAYSON COUNTY, TEXAS.

[Title omitted]

DEFENDANT'S FIRST TRIAL AMENDMENT—Filed Sept. 11, 1945

To the Honorable Said Court:

Comes now the defendant, The Texas Electric Railway Company, and, with leave of the Court first had and obtained, files this, its First Trial Amendment, and for same, says:

Without waiving any of the rights under its First Amended Original Answer heretofore filed herein, but still insisting on same, and in addition thereto, this defendant now says:

That the injuries received by the plaintiff herein, on the occasion in question, if any, resulted solely from a risk he assumed incident to, in the furtherance of, and in connection with his employment with the defendant, The Texas Electric Railway Company.

Alexander Gullett, Freeman, Wolfe & Keith, By Alexander Gullett, Attorneys for Defendant, The Texas Electric Railway Company.

[fol. 19-21] IN THE 15TH DISTRICT COURT OF GRAYSON COUNTY, TEXAS

[Title omitted]

DEFENDANT'S SECOND TRIAL AMENDMENT—Filed September 11, 1945

Now comes the defendant, Texas Electric Railway Company, and with leave of the Court first had and obtained, files this his second trial amendment and for same says:

The defendant would further show to the Court that in addition to the acts of negligence on the part of the plaintiff heretofore set out in Defendant's First Amended Original Answer, as being the sole proximate cause of the collision, injuries and damages resulting to plaintiff, if any, in the alternative said acts of negligence proximately caused or

proximately contributed to cause the injuries and damages sustained by plaintiff, if any, on the occasion in question.

Freeman, Wolfe & Keith, Alexander Gullett, Attorneys for Defendant.

[fol. 22] In the 15th District Court of Grayson County, Texas. July Term, A. D., 1945

[Title omitted]

Plaintiff's Exceptions to Charges—Filed Sept. 17, 1945

Comes now the plaintiff R. P. Hunter and before the Court's Main Charge is read to the jury and after the Court prepared the same and after copy thereof had been delivered to opposing counsel and to counsel for the plaintiff, and during the time allowed, plaintiff makes the following objections and exceptions to the Court's Charge, to-wit:

1

Plaintiff excepts to the charge as a whole because the charge does not cover the whole of plaintiff's case in that it omits the issues with reference to the failing of maintaining a block signal system, as shown in Plaintiff's Special Requested Issue Nos. 1a and 1b, which has been heretofore refused by the Court.

2

Plaintiff excepts to the charge because the charge fails to present the whole of plaintiff's case because it fails to submit the issues with reference to the negligent system as pleaded by plaintiff and as requested in Plaintiff's Special Requested Issue Nos. 2a and 2b, which has been heretofore refused by the Court.

3

Plaintiff excepts to the charge because the charge fails to cover the plaintiff's whole case in that it omits the plaintiff's pleaded theory of negligence in failing to properly apply the air brakes, as set out in Plaintiff's Special Requested Issue Nos. 3a, 3b and 3c, which has been heretofore refused by the Court.

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4

Plaintiff excepts to the charge because the charge fails to cover plaintiff's whole main case in that it does not submit to the jury questions concerning negligent failure to the stopping of the southbound car as pleaded by plaintiff and as requested in Plaintiff's Special Requested Issue Nos. 4a, 4b and 4c, which has been heretofore refused by the Court.

5

Plaintiff excepts to the charge because the charge fails to cover the whole of plaintiff's case in that it omits plain-
[fol. 23] tiff's pleaded issue of the negligence of defendant's southbound car operator in jumping from the car, as requested in Plaintiff's Special Requested Issue Nos. 5a, 5b and 5c, which has been heretofore refused by the Court.

6

Plaintiff excepts to the charge because the charge fails to cover the whole of plaintiff's case in that it omits issues with reference to the driver of the southbound car in his failure to properly slow down his car as shown by plaintiff's Requested Issue Nos. 6a, 6b and 6c, which has been heretofore refused by the Court.

7

Plaintiff objects and excepts to Special Issue No. 6 being submitted for the reason that because by submitting to the jury on the sole issue of discovered peril prior negligence either sole, concurrent or contributory is not in the case and is wholly immaterial and calculated to and will confuse the jury. It is calculated and will cause the jury to believe that it is the belief of the Court that prior negligence on the part of the plaintiff is important, and it is reasonably calculated to cause them to take this into consideration in answering the special issues on discovered peril.

(s) O. H. Woodrow and Spearman Webb, by Spearman Webb, Counsel for the Plaintiff.

The within and foregoing exception having been presented to me and to opposing counsel, and the same having

been considered by the Court, the same are in all things overruled, to which the plaintiff excepts.

(s) Jesse F. Holt, Judge of the 15th District Court.

[fol. 24] In the Fifteenth Judicial District Court, Grayson County, Texas

[Title omitted]

Plaintiff's Special Requested Issue No. 1(a)

To the Honorable the Said Court:

Come- now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

Plaintiff's Special Requested Issue No. 1(a)

Do you find from a preponderance of the evidence that in failing to maintain a block or signal system, or signal device at a point to the south of where the collision in question occurred, to inform plaintiff, one of defendant's motormen, of oncoming cars, and of the necessity to side-track to avoid a collision, was negligence as that term has been herein defined to you? Answer, yes or no.

Spearman Webb, O. H. Woodrow, By Spearman Webb, Attorneys for Plaintiff.

Plaintiff's Special Requested Issue No. 1(a) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before the same had been read to the jury and was by the court refused, to which action of the court plaintiff then and there in open court excepted.

(s.) Jesse F. Holt, Judge.

[fol. 25] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE NO. 1(B)

If you have answered plaintiff's Special Requested Issue 1(a) "yes" then you will answer the following special requested issue No. 1(b), otherwise you will not answer same:

Plaintiff's Special Requested Issue No. 1(b): Do you find from a preponderance of the evidence that the negligence that you have found in answer to Plaintiff's Special Requested Issue No. 1(a) if you have so found, was a proximate cause of the collision and plaintiff's injuries and damages, if any? Answer, yes or no.

Spearman Webb, O. H. Woodrow, By Spearman Webb, Attorneys for Plaintiff.

Plaintiff's Special Requested Issue No. 1(b) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before same had been read to the jury and was by the court, refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 26] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE NO. 2(A)

Do you find from a preponderance of the evidence, that the system that the defendant employed in the matter of the passing of the north and south bound cars between Sherman and Denison, at the hours of the day at which the collision occurred, under all the circumstances existing at the time, constituted negligence, as that term has been herein defined to you? Answer, yes or no.

Spearman Webb, O. H. Woodrow, By Spearman Webb, Attorneys for Plaintiff.

Plaintiff's Special Requested Issue No. 2(a) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before same had been read to the jury and was by the court, refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 27] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE NO. 2(B)

If you have answered Plaintiff's Special Requested Issue 2(a) "yes", then you will answer the following Special

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Requested Issue No. 2(b), otherwise you will not answer same:

Plaintiff's Special Requested Issue No. 2(b): Do you find from a preponderance of the evidence that the negligence that you have found in answer to Plaintiff's Special Requested Issue No. 2(a) if you have so found, was a proximate cause of the collision and plaintiff's injuries and damages, if any? Answer, yes or no.

Spearman Webb, O. H. Woodrow, By Spearman Webb, Attorneys for Plaintiff.

Plaintiff's Special Requested Issue No. 2(b) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before same had been read to the jury and was by the court refused, to which action of the court plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 28] In the Fifteenth Judicial District Court, Grayson County, Texas

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

Plaintiff's Special Requested Issue No. 3(a)

Do you find from a preponderance of the evidence, as he approached the point of collision in question, the driver of the south bound car, failed to properly apply the air-brakes on his said car? Answer, yes or no.

Spearman Webb, O. H. Woodrow, by Spearman Webb, Attorneys for Plaintiff.

Plaintiff's Special Requested Issue No. 3(a) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before same had been read to the jury and was by the court, refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 29] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE No. 3(B)

Do you find from a preponderance of the evidence, that the failure of the driver of defendant's south bound car, to properly apply his air-brakes on his said car, upon the occasion in question if you have so found, constituted negligence, as that term has been herein defined to you? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 3(b) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before the same had been read to the jury, and was by the court refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 30] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE No. 3(C)

If you have answered Plaintiff's Special Requested Issue No. 3(b) "yes", then you will answer the following Special Requested Issue No. 3(c), otherwise you will not answer same.

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Plaintiff's Special Requested Issue No. 3(c): Do you find from a preponderance of the evidence that the negligence that you have found in answer to Plaintiff's Special Requested Issue No. 3(b) if you have so found, was a proximate cause of the collision and plaintiff's injuries and damages, if any? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 3(c) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before same had been read to the jury, and was by the court refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 31] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE NO. 4(A)

Do you find from a preponderance of the evidence that the driver of defendant's south bound car, on the occasion in question, failed to stop his said car, as it approached the point of collision? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 4(a) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before same had been read to the jury, and was by the court refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 32] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE NO. 4(B)

Do you find from a preponderance of the evidence, that the failure of the driver of defendant's south bound car, on the occasion in question, to stop his said car, as it approached the point of collision, constituted negligence, as that term has been herein defined to you? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 4(b) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before the same had been read to the jury, and was by the court refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 33] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE NO. 4(C)

If you have answered Plaintiff's Special Requested Issue No. 4(b) "yes", then you will answer the following Special Requested Issue No. 4(c), otherwise you will not answer same:

Plaintiff's Special Requested Issue No. 4(c) Do you find from a preponderance of the evidence that the negli-

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gence that you have found in answer to Plaintiff's Special Requested Issue No. 4(b). If you have so found, was a proximate cause of the collision and plaintiff's injuries and damages, if any? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 4(c) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before the same had been read to the jury and was by the court, refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 34] In the Fifteenth Judicial District Court, Grayson County, Texas

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

Plaintiff's Special Requested Issue No. 5(a)

Do you find from a preponderance of the evidence, that the driver of defendant's south bound car, as he approached the point of collision, jumped from said car and left the same running wild? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 5(a) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before the same had been read to the jury and was by the court, refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 35] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now, R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE No. 5(B)

Do you find from a preponderance of the evidence, that the act of the driver of defendant's southbound car, in jumping from said car, as he approached the point of collision, and left said car running wild, if you have so found, constituted negligence, as that term has been herein defined to you? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 5(b) was prepared and presented to opposing counsel and to the court after the Main Charge of the court had been prepared and before the same had been read to the jury and was by the court refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 36] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Come-now, R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE No. 5(C)

If you have answered Plaintiff's Special Requested Issue No. 5(b) "Yes", then you will answer the following Special Requested Issue No. 5(c), otherwise you will not answer same; Plaintiff's Special Requested Issue No. 5(c) Do

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you find from a preponderance of the evidence that the negligence that you have found in answer to Plaintiff's Special Requested Issue No. 5(b) if you have so found, was a proximate cause of the collision and plaintiff's injuries and damages, if any? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 5(c) was prepared and presented to opposing counsel and to the court after the Main Charge of the court had been prepared and before the same had been read to the jury and was by the court refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 37] IN THE FIFTEENTH JUDICIAL DISTRICT COURT, GRAYSON COUNTY, TEXAS

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

PLAINTIFF'S SPECIAL REQUESTED ISSUE No. 6(A)

Do you find from a preponderance of the evidence, that as he approached the point of collision, the driver of defendant's southbound car, failed to properly slow said car down before reaching the point of collision. Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 6(a) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before the same had been read to the jury and was by the court refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 38] In the Fifteenth Judicial District Court, Grayson County, Texas

[Title omitted]

To the Honorable the Said Court:

Comes now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

Plaintiff's Special Requested Issue No. 6(b)

Do you find from a preponderance of the evidence, that the failure of the driver of defendant's southbound car, as he approached the point of collision, to properly slow said car down, constituted negligence, as that term has been herein defined to you? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, By Spearman Webb.

Plaintiff's Special Requested Issue No. 6(c) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before the same had been read to the jury and was by the court refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 39] In the Fifteenth Judicial District Court, Grayson County, Texas

[Title omitted]

To the Honorable the Said Court:

Come-now R. P. Hunter, plaintiff in the above numbered and styled cause, and requests the court to submit to the jury

Plaintiff's Special Requested Issun No. 6(c)

If you have answered Plaintiff's Special Requested Issue No. 6(b) "Yes" then you will answer the following Special Requested Issue No. 6(c), otherwise you will not answer same:

Plaintiff's Special Requested Issue No. 6(c) Do you find from a preponderance of the evidence that the negligence

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that you have found in answer to plaintiff's Special Requested Issue No. 6(b) if you have so found, was a proximate cause of the collision and plaintiff's injuries and damages, if any? Answer, yes or no.

Spearman Webb, O. H. Woodrow, Attorneys for Plaintiff, by Spearman Webb.

Plaintiff's Special Requested Issue No. 6(c) was prepared and presented to opposing counsel and to the court after the main charge of the court had been prepared and before the same had been read to the jury and was by the court refused, to which action of the court, plaintiff then and there in open court excepted.

Jesse F. Holt, Judge.

[fol. 40] In the 15th Judicial District Court, Grayson County, Texas, July Term, A. D. 1945

[Title omitted]

Charge of the Court, September 14, 1945

Gentlemen of the Jury:

This case is submitted to you on special issues—that is, you are called on to answer some questions as to particular facts in the case, from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matter of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, please remember that there are standards of conduct to be lived up to, and rules to be obeyed, and that if you do not comply with them, our efforts will be wasted.

1. Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations.

–. Do not discuss the case, or even mention it to anyone whomsoever, nor permit it to be mentioned in your hearing, except in the jury room when all jurors are present for the purpose of deliberating on the verdict. If any one attempts to mention the case to you otherwise, you must report it to the court at once. You will be permitted to separate at recess periods and to go home at night only

with the understanding that you will rigidly observe this rule.

3. Hold yourselves apart from the lawyers, the witnesses, and the parties to the suit. They are compelled to hold themselves apart from you, and they understand your aloofness.

4. Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

5. Be very careful not to consider or mention any personal knowledge or information you may have about any fact or person, which is not shown by the evidence you have heard in this trial. Do not try to gather any evidence for yourselves. Your duty is to answer these questions from the evidence you have heard here, and from that alone.

6. Do not try to reach a verdict by lot, or chance, and do not return a quotient verdict, by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result. Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way.

7. Do not decide who you think should win, and then try to answer the questions accordingly. If you do that, your verdict will be worthless, and all of our time will have been wasted. Simply answer the questions as you find the facts from the evidence, without concerning yourselves about the effect of your answers.

Keep these rules in mind at all times, and obey them strictly, until you have returned your verdict. The verdict will consist of your answers to the questions, written in the blanks provided, with the certificate signed by your foreman on the last page of the charge.

[fol. 41] Do not consider any evidence excluded by the Court, or to which objections were sustained by the Court.

For your guidance, I submit to you the following definitions:

1. "Negligence", as that term is used in this charge and as applicable to this case in its legal signification, is the

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failure to exercise ordinary care; and "ordinary care", as used herein is such care as a person of ordinary prudence would use under the same or similar circumstances.

2. The term "proximate cause," as used in this charge, means the moving or producing cause that brings about an event or happening and without which such event or happening would not have occurred; that is, an act becomes the proximate cause of an event or happening whenever such event or happening is a natural and probable consequence of the act in question and is such a consequence as ought to have been foreseen by a person in the exercise of ordinary care in the light of attending circumstances."

3. The term "preponderance of the evidence", as used herein means the greater weight and degree of credible evidence admitted before you.

4. By the term "sole proximate cause" is meant the only proximate cause, There can be but one sole proximate cause of an event.

Special Issue No. 1:

Do you find from a preponderance of the evidence that the negligence of the plaintiff R. P. Hunter in failing to await the arrival of the southbound interurban car on the occasion in question caused him to be in a position of peril as he approached the point of collision?

Answer "Yes" or "No".

Answer: .....

If you have answered the foregoing issue "Yes", then you will answer the following issue, but if you have answered the foregoing issue "No", then you will not answer the following issue.

Special Issue No. 2:

Do you find from a preponderance of the evidence that the operator of the defendant's southbound interurban car on the occasion in question actually discovered the plaintiff's perilous position in time to have averted injury to the plaintiff by the use of all means at his command commensurate with his own safety and the safety of his passengers and the interurban car which he was operating?

Answer "Yes" or "No".

Answer: .....

If you have answered the foregoing issue "Yes", then you will answer the following issue, but if you have answered the foregoing issue "no", then you will not answer the following issue:

[fol. 42] Special Issue No. 3:

Do you find from a preponderance of the evidence that the operator of defendant's southbound interurban car thereafter failed to use all the means at his command commensurate with his own safety and the safety of the passengers in the interurban car which he was operating to prevent said collision?

Answer "Yes" or "No".

Answer: .....

If you have answered the foregoing issue "Yes", then you will answer the following issue, but if you have answered the foregoing issue "No", then you will not answer the following issue.

Special Issue No. 4:

Do you find from a preponderance of the evidence that such failure was negligence as that word has been defined to you herein?

Answer "Yes" or "No".

Answer: .....

If you have answered the foregoing issue "yes", then you will answer the following issue, but if you have answered the foregoing issue "No", then you will not answer the following issue.

Special Issue No. 5:

Do you find from a preponderance of the evidence that such negligence was a proximate cause of the injuries, if any, to plaintiff on the occasion in question?

Answer "Yes" or "No".

Answer: .....

If you have answered each of the foregoing issues "Yes", then you will not answer the following issue, but if you have answered any of the foregoing issues "No", then you will answer the following issue.

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Special Issue No. 6:

Do you find from a preponderance of the evidence that the negligence of the plaintiff R. P. Hunter in failing to await the arrival of the southbound interurban car upon the occasion in question was the sole proximate cause of the injuries, if any, he received?

Answer "Yes" or "No".

Answer: _____

[fol. 43] Special Issue No. 7:

What amount of money, if paid now in cash, will compensate the plaintiff R. P. Hunter for the personal injuries, if any, sustained by said plaintiff on the occasion in question?

Answer in dollars and cents.

Answer: $ None.

In connection with your answer to Special Issue No. 7, you may take into consideration the mental anguish and physical pain, if any, suffered by the plaintiff R. P. Hunter to date and such mental anguish and physical pain that is reasonably probable that he will suffer in the future as the sole result of said injuries, if any, and such disease and diseases, if any, that naturally result from said injuries, if any, and such reasonable and necessary physicians and medical and hospital expenses, if any, to date paid by the said R. P. Hunter by reason of said injuries, if any. You may also take into consideration the loss of earning power, if any, sustained by the plaintiff R. P. Hunter as a result of said injuries, if any.

Concluding Instructions.

In your deliberations, if you require any further instruction from the Court, put your request in writing and give it to the bailiff at the door of the jury room, to be handed to the Court.

After you retire to consider your verdict you will elect your own foreman. It is then his duty at once to read aloud, in the jury room, the first portion of this charge, laying down the rules which you must obey. Listen to them again, carefully, at that time. After you have retired, if any juror starts to violate any of those rules, it is the duty of the other jurors to call his attention to the matter at once

and caution him. If any juror persists in such violation, or deliberately violates a rule, the other jurors should report the matter at once to the Court. Let your verdict be signed by your foreman whom you will select from among your number.

Jesse F. Holt, Judge.

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

W. J. Sappenfield, Foreman.

[fol. 44] In the 15th Judicial District Court, Grayson County, Texas, July Term, A. D. 1945

[Title omitted]

Verdict—September 14, 1945

Special Issue No. 1:

Do you find from a preponderance of the evidence that the negligence of the plaintiff R. P. Hunter in failing to await the arrival of the southbound interurban car on the occasion in question caused him to be in a position of peril as he approached the point of collision?

Answer "Yes" or "No".

Answer: Yes

If you have answered the forequestion issue "Yes", then you will answer the following issue, but if you have answered the foregoing issue "No", then you will not answer the following issue.

Special Issue No. 2:

Do you find from a preponderance of the evidence that the Operator of the defendant's southbound interurban car on the occasion in question actually discovered the plaintiff's perilous position in time to have averted injury to the plaintiff by the use of all means at his command commensurate with his own safety and the safety of his passengers and the interurban car which he was operating?

Answer "Yes" or "No".

Answer: No

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If you have answered the foregoing issue "Yes", then you will answer the following issue, but if you have answered the foregoing issue "No", then you will not answer the following issue:

Special Issue No. 3:

Do you find from a preponderance of the evidence that the operator of defendant's southbound interurban car thereafter failed to use all the means at his command commensurate with his own safety and the safety of the passengers in the interurban car which he was operating to prevent said collision?

Answer "Yes" or "No".

Answer: _____

[fol. 45] If you have answered the foregoing issue "Yes", then you will answer the following issue, but if you have answered the foregoing issue "No", then you will not answer the following issue.

Special Issue No. 4:

Do you find from a preponderance of the evidence that such failure was negligence as that word has been defined to you herein?

Answer "Yes" or "No".

Answer: _____

If you have answered the foregoing issue "Yes", then you will answer the following issue, but if you have answered the foregoing issue "No", then you will not answer the following issue.

Special Issue No. 5:

Do you find from a preponderance of the evidence that such negligence was a proximate cause of the injuries, if any, to plaintiff on the occasion in question?

Answer "Yes" or "No".

Answer: _____

If you have answered each of the foregoing issues "Yes", then you will not answer the following issue, but if you have answered any of the foregoing issues "No", then you will answer the following issue.

Special Issue No. 6:

Do you find from a preponderance of the evidence that the negligence of the plaintiff R. P. Hunter in failing to await the arrival of the southbound interurban car upon the occasion in question was the sole proximate cause of the injuries, if any, he received?

Answer "Yes" or "No".

Answer: Yes

Special Issue No. 7:

What amount of money, if paid now in cash, will compensate the plaintiff R. P. Hunter for the personal injuries, if any, sustained by said plaintiff on the occasion in question?

Answer in dollars and cents.

Answer: $ None.

In connection with your answer to Special Issue No. 7, you may take into consideration the mental anguish and physical pain, if any, suffered by the plaintiff R. P. Hunter [fols. 46-47] to date and such mental anguish and physical pain that is reasonably probable that he will suffer in the future as the sole result of said injuries, if any, and such disease and diseases, if any, that naturally result from said injuries, if any, and such reasonable and necessary physicians and medical and hospital expenses, if any, to date paid by the said R. P. Hunter by reason of said injuries, if any. You may also take into consideration the loss of earning power, if any, sustained by the plaintiff R. P. Hunter as a result of said injuries, if any.

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

(S.) W. J. Sappenfield, Foreman.

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[fol. 48] IN THE DISTRICT COURT OF GRAYSON COUNTY, TEXAS FIFTEENTH JUDICIAL DISTRICT

MOTION FOR JUDGMENT—Filed September 15, 1945

To Said Honorable Court:

Now comes the defendant, Texas Electric Railway Company, a corporation, and moves the Court to enter judgment in its favor and against the plaintiff upon the verdict and special findings of the jury.

(S.) Alex Gullett, Freeman, Wolfe & Keith, by (S.) Sam D. Wolfe, Attorneys for Defendant.

[fol. 49] IN DISTRICT COURT OF GRAYSON COUNTY,

SEPTEMBER 24, 1945

No. 53920

R. P. HUNTER

vs.

TEXAS ELECTRIC RAILWAY COMPANY

JUDGMENT—September 24, 1945

On this day Court being in session, came on regularly for hearing the defendant's Motion for Judgment to be entered herein upon the verdict and special findings of the jury in its behalf, and that the plaintiff take nothing by this suit, and that the defendant go hence without day, and have judgment for its costs.

Counsel for the plaintiff and for the defendant being present, the Court proceeded to hear and consider the said motion, and after due consideration is of the opinion that the said motion should be and is hereby granted, and the following judgment should be entered herein.

Pursuant to prior setting of this cause, the same was called for trial on September 10, 1945, and plaintiff and defendant both announced ready for trial.

A jury being demanded, all matters of fact as well as of law were submitted to the Court, and a jury composed of W. J. Sappenfield, and eleven others, which was duly

selected, empaneled, sworn and charged herein, and the trial was regularly had before said jury.

Thereafter, and on the 14th day of September, 1945, the jury, after being duly charged, retired to consider their verdict, and thereafter on said 14th day of September, 1945, said jury returned its verdict and special findings in due form, and the same was received by the Court. The cause having been submitted on special issues, the verdict and special findings so returned by the jury being as follows:

Special Issue No. 1:

Do you find from a preponderance of the evidence that the negligence of the plaintiff, R. P. Hunter in failing to await the arrival of the southbound interurban car on the occasion in question caused him to be in a position of peril as he approached the point of collision?

Answer "yes" or "No".

Answer: Yes.

If you have answered the foregoing issue "Yes", then you will answer the following issue, but if you have an-
[fol. 50] swered the foregoing issue "No", then you will not answer the following issue.

Special Issue No. 2:

Do you find from a preponderance of the evidence that the operator of the defendant's southbound interurban car on the occasion in question actually discovered the plaintiff's perilous position in time to have averted injury to the plaintiff by the use of all means at his command commensurate with his own safety and the safety of his passengers and the interurban car which he was operating?

Answer "yes" or "no

Answer: No

If you have answered the foregoing issue "yes" then you will answer the following issue, but if you have answered the foregoing issue "no" then you will not answer the following issue:

Special Issue No. 3:

Do you find from a preponderance of the evidence that the operator of defendant's southbound interurban car

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thereafter failed to use all the means at his command commensurate with his own safety and the safety of the passengers in the interurban car which he was operating to prevent said collision?

Answer "yes" or "no".

Answer _____

If you have answered the foregoing issue "yes" then you will answer the following issue, but if you have answered the foregoing issue "no" then you will not answer the following issue.

Special Issue No. 4:

Do you find from a preponderance of the evidence that such failure was negligence as that word has been defined to you herein?

Answer "yes" or "no".

Answer _____

If you have answered the foregoing issue "yes" then you will answer the following issue, but if you have answered the foregoing issue "no" then you will not answer the following issue.

Special Issue No. 5:

Do you find from a preponderance of the evidence that such negligence was a proximate cause of the injuries, if any, to plaintiff on the occasion in question?

Answer "yes" or "no".

Answer _____

If you have answered each of the foregoing issues "yes" then you will not answer the following issue, but if you have answered any of the foregoing issues "no" then you will answer the following issue.

[fols. 51-53] Special Issue No. 6:

Do you find from a preponderance of the evidence that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the southbound interurban car upon the occasion in question was the sole proximate cause of the injuries, if any, he received?

Answer "yes" or "no".

Answer: Yes

Special Issue No. 7:

What amount of money, if paid now in cash, will compensate the plaintiff R. P. Hunter for the personal injuries, if any, sustained by said plaintiff on the occasion in question?

Answer in dollars and cents.

Answer: None

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

(Signed) W. J. Sappenfield, Foreman.

From said verdict and special findings, supplemented by findings of fact by the Court, the court is of the opinion and finds for the defendant and against the plaintiff.

It is, therefore, the order, judgment and decree of the Court that the plaintiff, R. P. Hunter, take nothing as against the defendant, Texas Electric Railway Company, a corporation, and that the said defendant, Texas Electric Railway Company, go hence without day with its costs.

It is the Further Order, Judgment and Decree of the Court that the said defendant and all officers of the Court entitled to collect costs herein do have and recover of and from the plaintiff, R. P. Hunter, all costs hereof for which execution is awarded.

To all of which the plaintiff in open court duly and seasonably excepted, and gave notice of appeal to the court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, Texas.

(S.) Jesse F. Holt, Judge.

OK as to form.

Spearman Webb & O. H. Woodrow,
Attys. for Pltf.

[fol. 54] In the 15th District Court of Grayson County, Texas

[Title omitted]

Amended Motion for New Trial—Filed October 29, 1945

To the Honorable Judge of Said Court:

Comes the plaintiff, R. P. Hunter, and leave of the court first had, files this, his First Amended Motion for New

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Trial, and for same says that the court should set aside the verdict of the jury and the judgment of the court and grant him a new trial for the following reasons:

(1) The verdict of the jury was one clearly due to prejudice, and so reflected by the answer of the jury, particularly Special Issue No. 7 of the court's main charge, wherein the court enquired of the amount of money that would compensate the plaintiff, which said enquiry was followed by an appropriate charge on the measure of damages, and wherein the jury answered, "None".

The undisputed testimony of both the plaintiff and the defendant was that the plaintiff was seriously injured; had suffered mental and physical pain; had suffered loss of earnings in the past; had suffered total loss of earning power in the future.

Clearly the answer of the jury was deliberately made against not only the greater weight of credible testimony, but against all testimony in the case, thereby showing on its face two things:

(a) The jury was deliberately attempting to answer the question in such a way that the plaintiff could not recover judgment for any sum, regardless of the answers to the other questions;

(b) The said answer clearly reflected on its face the existence of prejudice against the plaintiff and the plaintiff's rights.

Therefore, the whole verdict of the jury was polluted and tainted with such deliberation and prejudice reflected by said answer, and should be set aside and a new trial granted.

(2) The court erred in refusing to give to the jury Plaintiff's Special Requested Issue No. 1(a), and its two related issues, to-wit: Special Requested Issue Nos. 1(b) and 1(c); said Special Requested Issue No. 1(a), being as follows, to-wit:

[fol. 55] "PLAINTIFF'S SPECIAL REQUESTED ISSUE
No. 1(A)

Do you find from a preponderance of the evidence that in failing to maintain a block or signal system, or signal device at a point to the south of where the collision in

question occurred, to inform plaintiff, one of defendant's motormen, of on-coming cars, and of the necessity to sidetrack to avoid a collision, was negligence as that term has been herein defined to You? Answer yes or no."

(3) The court erred in refusing to give to the jury Plaintiff's Special Requested Issue No. 2(a), and its one related issue, to-wit: Special Requested Issue No. 2(b); said Special Requested Issue No. 2(a) being as follows, to-wit:

"PLAINTIFF'S SPECIAL REQUESTED ISSUE NO. 2(A)

Do you find from a preponderance of the evidence, that the system that the defendant employed in the matter of the passing of the North and South bound cars between Sherman and Denison, at the hour of the day at which the collision occurred, under all the circumstances existing at the time, constituted negligence, as that term has been herein defined to you? Answer yes or no."

(4) The court erred in refusing to give to the jury Plaintiff's Special Requested Issue No. 3(a), and its two related issues, to-wit: Special Requested Issues Nos. 3(b) and 3(c); said Special Requested Issue No. 3(a) being as follows, to-wit:

"PLAINTIFF'S SPECIAL REQUESTED ISSUE NO. 3(A)

Do you find from a preponderance of the evidence, as he approached the point of collision in question, the driver of the South bound car, failed to properly apply the air-brakes on his said car? Answer yes or no."

(5) The court erred in refusing to give to the jury Plaintiff's Special Requested Issue No. 4(a), and its two related issues, to-wit: Special Requested Issues Nos. 4(b) and 4(c); said Special Requested Issue No. 4(a) being as follows, to-wit:

"PLAINTIFF'S SPECIAL REQUESTED ISSUE NO. 4(A)

Do you find from a preponderance of the evidence that the driver of defendant's South bound car, on the occasion in question, failed to stop his said car, as it approached the [fol. 56] point of collision? Answer yes or no."

(6) The court erred in refusing to give to the jury Plaintiff's Special Requested Issue No. 5(a), and its two related

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issues, to-wit: Special Requested Issues Nos. 5(b) and 5(c); said Special Requested Issue No. 5(a) being as follows, to-wit:

"PLAINTIFF'S SPECIAL REQUESTED ISSUE No. 5(A)

Do you find from a preponderance of the evidence, that the driver of defendant's South-bound car, as he approached the point of collision, jumped from said car and left the same running wild? Answer yes or no."

(7) The court erred in refusing to give to the jury Plaintiff's Special Requested Issue No. 6(a), and its two related issues, to-wit: Special Requested Issues Nos. 6(b) and 6(c); said Special Requested Issue No. 6(a) being as follows, to-wit:

"PLAINTIFF'S SPECIAL REQUESTED ISSUE No. 6(A)

Do you find from a preponderance of the evidence that as he approached the point of collision, the driver of defendant's south-bound car, failed to properly slow said car down before reaching the point of collision? Answer yes or no."

(8) The court erred in overruling Plaintiff's Objection and Exception No. 1 to the court's main charge, reading as follows:

"Plaintiff excepts to the charge as a whole because the charge does not cover the whole of plaintiff's case in that it omits the issues with reference to the failing of maintaining a block signal system, as shown in Plaintiff's Special Requested Issues Nos. 1a and 1b, which has been heretofore refused by the Court."

(9) The court erred in overruling Plaintiff's Objection and Exception No. 2 to the court's main charge, reading as follows:

"Plaintiff excepts to the charge because the charge fails to present the whole of plaintiff's case because it fails to submit the issues with reference to the negligent system as pleaded by plaintiff and as requested in Plaintiff's Special Requested Issue- Nos. 2a and 2b, which has been heretofore refused by the Court."

(10) The court erred in overruling Plaintiff's Objection and Exception No. 3 to the court's main charge, reading as follows:

"Plaintiff excepts to the charge because the charge fails to cover the plaintiff's whole case in that it omits the [fol. 57] plaintiff's pleaded theory of negligence in failing to properly apply the air brakes, as set out in Plaintiff's Special Requested Issue- Nos. 3a, 3b, and 3c, which has been heretofore refused by the Court."

(11) The court erred in overruling Plaintiff's Objection and Exception No. 4 to the court's main charge, reading as follows:

"Plaintiff excepts to the charge because the charge fails to cover plaintiff's whole main case in that it does not submit to the jury questions concerning negligent failure to the stopping of the southbound car as pleaded by plaintiff and as requested in Plaintiff's Special Requested Issue- Nos. 4a, 4b, and 4c, which has been heretofore refused by the Court."

(12) The court erred in overruling Plaintiff's Objection and Exception No. 5 to the court's main charge, reading as follows:

"Plaintiff excepts to the charge because the charge fails to cover the whole of plaintiff's case in that it omits plaintiff's pleaded issue of the negligence of defendant's southbound car operator in jumping from the car, as requested in Plaintiff's Special Requested Issues Nos. 5a, 5b and 5c, which has been heretofore refused by the Court."

(13) The court erred in overruling Plaintiff's Objection and Exception No. 6 to the court's main charge, reading as follows:

"Plaintiff excepts to the charge because the charge fails to cover the whole of plaintiff's case in that it omits issues with reference to the driver of the southbound car in his failure to properly slow down his car as shown by plaintiff's Requested Issue- Nos. 6a, 6b, and 6c, which has been heretofore refused by the Court."

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(14) The court erred in overruling Plaintiff's Objection and Exception No. 7 to the court's main charge, reading as follows:

"Plaintiff objects and excepts to Special Issue No. 6 being submitted for the reason that because by submitting to the jury on the sole issue of discovered peril prior negligence either sole, concurrent or contributory is not in the case and is wholly immaterial and calculated to and will confuse the jury. It is calculated and will cause the jury to believe that it is the belief of the Court that prior negligence on the part of the plaintiff is important, and it is reasonably calculated to cause them to take this into con-
[fol. 58] sideration in answering the special issues on discovered peril."

Wherefore, plaintiff prays that the verdict of the jury and the judgment rendered thereupon be set aside, and that he be granted a new trial.

Spearman Webb and Otis H. Woodrow, Attorneys for Plaintiff, R. P. Hunter, by O. H. Woodrow

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[fol. 59-67] In District Court of Grayson County

[Title omitted]

Order Overruling Amended Motion for New Trial—November 1, 1945

On this day Plaintiff's amended motion for a new trial is overruled to which ruling of the court the plaintiff then and there in open court duly excepted and gave notice of appeal to our court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas, sitting in Dallas, Texas.

[fols. 68-70] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 71] No. 52,920

R. P. HUNTER

vs.

TEXAS ELECTRIC RAILWAY COMPANY

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[fol. 73] IN THE 15TH DISTRICT COURT OF GRAYSON COUNTY, TEXAS, JULY TERM, A. D. 1945

Stenographer's Statement of Facts

APPEARANCES:

Hon. Spearman Webb, Sherman, Texas; Hon. O. H. Woodrow, Sherman, Texas, Attorneys for the Plaintiff; Messrs. Freeman & Wolfe, Sherman, Texas; Hon. Sam Wolfe; Hon. Alexander Gullett, Attorneys for the Defendant.

[fol. 74] September 11, 1945. (Jury brought in)

R. P. HUNTER, the plaintiff, after having been sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct-examination.

By Mr. Webb:

Q. Will you please state your name?
A. R. P. Hunter.
Q. Mr. Hunter, what is your age?
A. Sixty years last birthday.
Q. Where do you live?
A. 323 West Cherry, Sherman.
Q. How long have you lived in Sherman?
A. Since the first of January, 1907.
Q. How long have you lived in Grayson County?
A. Same time.
Q. Thirty-eight years?
A. Thirty-eight years, yes sir.
Q. What has been your occupation up until the time you claim you were hurt about a year ago?
A. I was a motorman for the Texas Traction Company from 1910 until the present time.
Q. Worked for the Texas Electric Company from 1910. Do you remember what part of 1910?
A. August 16th.
Q. August 16, 1910, until the day of that collision, and when was that?
A. May 2, 1944.
Q. August, 1910, to May, 1944?
A. Yes.

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Q. Lacking a few months of thirty-four continuous years with that company?

A. Yes, sir.

Q. During that time were you a motorman all the time, or a portion of the time?

A. About eight years I was in the dispatcher's office.

Q. Then you were for 36 years a motorman and eight years in the dispatcher's office.

A. Yes, sir.

[fol. 75] Q. Where was that office?

A. Over the Interurban Station.

Q. In Sherman?

A. Yes, sir.

Q. When you first went to work for this company, what was it known as then?

A. Texas Traction Company.

Q. Now it is the Texas Electric Railway?

A. Texas Electric Railway, yes sir.

Q. Several years ago it changed itself from a railroad into a ——

Gullett: Wait a minute! It is leading and suggesting, and calling for a conclusion on the part of the witness.

Court: Sustain the objection.

Webb: We except.

Q. Does the Railway Company handle freight?

A. They didn't up until——

Gullett: We object, it is not responsive to the question asked.

Court: Overrule the objection.

Gullett: We except.

Webb: When did they commence handling freight?

A. To my knowledge, the best of my knowledge——

Gullett: Just a minute. We object. It is an assumption on the part of the witness.

Court: Overruled.

Gullett: We except.

A. Since 1932.

Webb: Since 1932, it has been handling freight as well as passengers?

Gullett: We object to that as leading.

Court: I think it is leading. Sustain the objection.

Webb: All right. Since 1932, has it not been handling [fol. 76] freight as well as passengers?

A. Yes, sir.

Q. Now then, where are your runs as motorman—between what different towns were your runs during those 26 years?

A. From Denison to Dallas.

Q. To Dallas all that time, or a portion of the time?

A. Well, about a year and a half before the accident, I was working between Denison and Sherman only.

Q. A year and a half before the collision, you were working between Denison and Sherman only?

A. Yes.

Q. Where did you start?

A. Sherman.

Q. At what hour?

A. 7:05 part of the time, in the morning, and part at 7:30 in the morning.

Q. When was your day's work done?

A. 4:30.

Q. How many round trips did you make during the day?

A. Five.

Q. You made five round trips daily?

A. Yes, sir.

Q. Those cars, were they different or the same that ran from Denison to Dallas?

A. They were the same cars.

Q. You remember about the dimensions of those cars?

A. Well, about 55 feet long, I think they were. Some were a little bit longer. Different type cars and different length.

Q. What was the capacity—passengers?

A. Some was 38 passengers to 44 or 48.

Q. Did you drive the same one or different one?

A. Different one.

Q. On the run from Sherman to Denison——

A. It was different. Practically every week, unless something happened and I had to change cars.

Q. Were your cars—did you handle freight or just passengers, or both?

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A. Passengers and express, if anything happened to go [fol. 77] over—baggage.

Q. On this day of the collision—I will ask you this: Which run or which round trip was it that this collision happened? First, second, third or fourth?

A. It was the fourth one.

Q. What time in the afternoon did it occur?

A. At 2:47.

Q. Now, do you remember how many passengers you had on the car at that time?

A. Just a guess, between fifteen or twenty.

Q. Was it or not loaded to its capacity?

A. It was not, no.

Q. Did you—can you tell the Court and Jury—just begin at the hour you left Sherman until when you had the collision?

A. I left Sherman at 2:30, and nothing unusual happened except the regular routine of business.

Q. You were headed north?

A. I was headed north, picking up passengers and collecting fares.

Q. One-man cars?

A. One-man cars.

Q. All interurbans at that time were one-man cars?

A. All the interurbans at that time were one-man cars. Yes.

Q. You mean by that there was or was not anyone to help you? A conductor or motorman?

A. There was not.

Q. You had the conducting and motoring and collecting of tickets?

A. I had to do everything, yes, sir.

Q. When you got to Woodlake, what did you do?

A. I rode up to the stop and stopped, and then glanced over my shoulder and I thought I saw the car in there.

Q. Which car? The car you collided with?

A. Yes, sir. And then proceeded up north about a mile or three-quarters of a mile north of Woodlake.

Q. At Woodlake, did they have any written orders?

A. No, sir.

[fol. 78] Q. Did they have any block signal or character of signal so that the southbound car should be waited for?

A. No, sir, it did not.

Q. Then, as you proceeded north you say you got about ¾ths of a mile north. What happened?

A. I saw this other car coming.

Q. How far were you from this other car when you saw it?

A. Between 700 and 800 feet.

Q. What did you do?

A. I immediately applied my brakes and stopped.

Q. Now then, tell the court and jury how you work—how many set brakes do you have?

A. One air lever.

Q. Emergency brake, did you have one of them?

A. It is an emergency air, yes, sir.

Q. How do you stop one of those cars when it is moving? How do you apply the brakes to properly stop the car?

A. Push your lever over to where you can hear the air going.

Q. Do you gradually put it to a stop?

A. Of course when you apply your brakes, it stops getting all the air in, and that is all you can do.

Q. How long does it takes the air—does it stop suddenly or gradually?

A. It stops quick, not suddenly. Set your air over, push your lever over and get all your air between the count of two or three, but you can get all the air and power you got within a fraction of a sec*tion*, or something like that.

Q. Do you keep working the lever?

A. You don't release it until you get to a stop.

Q. When you get to a stop, what do you do?

A. You release your air to bring your car to a stop without a sudden jerk.

[fol. 79] Q. You don't release the air until the car is slowed down to a stop?

A. Yes, sir.

Q. And then you release the air?

A. Yes, sir.

Q. Until it brings it to a stop?

A. Yes.

Q. At what rate of speed were you traveling when you first saw the interurban from the north?

A. I would say about twenty miles an hour.

Q. Was it a wet or dry day?

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A. It was dry.

Q. Were the rails slick or dry?

A. They were dry.

Q. Was your car in good working order?

A. Yes, sir.

Q. What condition were the brakes in?

A. They were fair.

Q. When you first saw that car 700 or 800 feet away from you, what did you do?

A. I applied my air.

Q. How many feet did you run before you brought it to a stop?

A. I would say a hundred feet.

Q. A hundred feet? You brought your car to a stop within a hundred feet from the time you applied your brakes?

A. That's right.

Q. Did you jump from that car and run?

A. No, sir.

Q. What rate of speed was this southbound car coming?

A. I would say 50 miles an hour.

Q. You were just moving out of Woodlake after you brought it to a stop—¾ of a mile?

A. Yes, sir.

Q. This on-coming car, coming 50 miles an hour, you say—coming toward you—did you notice what the motorman of that car did then?

A. He reversed his car. Reversed his power.

Q. Did he throw on any brakes?

A. No.

Q. Could you tell by the action of the car whether or not he threw on any brakes?

A. Yes.

[fol. 80] Q. What did he do?

A. Opened the door and jumped.

Q. How far were you from his car?

A. It looked to me like five hundred feet.

Q. You knew that that car was coming toward you. Was it slowing down any?

A. He did not slow down a bit.

Q. You knew he didn't apply his brakes?

A. Yes.

Q. Could you have jumped and saved your own hide?

A. I could have gotten off at any time.
Q. Did he have any passengers on his car?
A. Yes, sir.
Q. Did you leave your passengers and jump?
A. No, sir.
Q. When those two cars came together, there were a lot of people hurt?
A. Yes, sir.
Q. Were you hurt?
A. Yes, sir.
Q. Much or little?

Gullett: We object to that as being self-serving and a conclusion.
Court: Sustained.
Webb: All right, we except.

Q. What happened to you after the collision?
A. Well, I was picked up and brought to Sherman to the hospital.
Q. What hospital?
A. The St. Vincent's.
Q. How long were you in that hospital?
A. Day or two over three weeks. I don't remember just exactly.
Q. Then where were you taken?
A. Taken home.
Q. How were you taken home?
A. Ambulance.
Q. How long did you stay at home before you went to the hospital again?
A. I went to the hospital on September 29th—the same year, 1944.
Q. When you were at home, were you in bed?
A. In bed most of the time, and up around on crutches.
[fol. 81] Q. How long did you stay in the hospital in September?
A. The first time seven days, and at home seven days.
Q. How were you taken to the hospital?
A. Ambulance.
Q. How did you get home from the hospital?
A. Ambulance.
Q. The next time you were taken——

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A. I was home seven days and went back and stayed in the hospital, and stayed two days over seven weeks.

Q. How did you get to the hospital that time?

A. In the ambulance.

Q. That would be 51 days. How did you get home from the hospital?

A. Ambulance.

Q. Since that time, have you been around the house just occasionally or continually?

A. I have been at home all the time.

Q. Have you been able to get around or work?

A. I haven't been able to work. I get around at home a bit. I was in bed two weeks after I got home from the hospital.

Q. Was either leg broken?

A. The left leg was broken.

Q. Whereabouts?

A. Ankle broken in two places, and the bone on the side of the left knee was shattered, and big bone in the knee was shattered and broken, and the knee cap was busted, broken in two.

Q. Did you have any other injuries to your body?

A. Yes, I was pretty blue all over my body, across my stomach.

Q. Your abdomen?

A. Yes, sir.

Q. On which side?

A. The left side.

Q. From the left side to your right?

A. Yes, sir.

Q. Did it pain you?

A. Yes, some.

Q. Did you have any heart trouble before this collision?

A. No, sir.

[fol. 82] Q. Have you had any since this collision?

A. I have, yes.

Q. How soon after the collision did you notice symptoms of heart trouble?

A. Just about a week.

Q. During that period of time, were you suffering much or little from that leg?

A. I suffer with it all the time.

Q. Suffer from all the bruises on the back and other portions of your body?

A. Yes, sir, suffer quite a bit.

Q. Did they put any plaster of Paris cast on your body?

A. On the left leg, yes, sir.

Q. From where?

A. Half way from the hip to the knee, clear to the foot.

Q. What?

A. Half way from the hip to the knee, clear to the end of the toes.

Q. How long did they keep the plaster of Paris cast on you?

A. Six weeks.

Q. Did you notice any—can you state to the Court and Jury whether or not now there is any pain or trouble in your knee and ankle?

A. Yes, they are sore all the time.

Q. State whether or not they do or do not swell.

A. They do swell. At night it is almost twice as big as when normal, and my knee swells some in the day.

Q. Does it cause pain?

A. It is painful, yes sir.

Q. Are you able to stand on that leg and do anything?

A. Short time only.

Q. Can you do any lifting on it?

A. No.

Q. Have you had heart attacks since this collision?

A. Yes.

Q. Did you have any before the collision?

A. No.

Q. How does that heart failure manifest itself?

A. Just a pain in the chest—all over the chest. The only way I can explain it is as sharp pains.

[fol. 83] Q. You have shortness of breath?

A. Yes, when those pains hit, I do.

Q. Did you have them before?

A. No.

Q. Who has been your doctor?

A. Dr. Gleckler was the doctor at St. Vincent's, and Dr. Stout is our family physician.

Q. Dr. Gleckler—how long did he wait on you?

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A. Well, the only time was when I was at the hospital and then up until about the latter part of June. He dismissed the case.

Q. About how many months?

A. Two months, I will say.

Q. Was Dr. Gleckler, was he the second or first one after the collision?

A. The first one.

Q. How long did he wait on you?

A. While I was at the hospital, and he came to the house twice after I got home.

Q. The rest of the time Dr. Stout waited on you?

A. That was after I was stricken in December.

Q. In December?

A. In December.

Q. Who put the plaster of Paris cast on you?

A. Dr. Gleckler.

Q. Now, you stayed with your car until you got it stopped?

A. Yes, sir.

Q. You didn't leave until you had gotten it stopped?

Gullett: Object to that as leading.

Court: Sustain the objection.

Q. Have you earned any money at all since you were injured?

A. One dollar.

Q. What was that for?

A. Special venire. I mean, jury service.

Q. In what court?

A. Special Venire in the 59th.

Q. They didn't use you, then?

A. No.

[fol. 84] Q. You stayed long enough to get off?

A. Yes, sir.

Q. That is the only dollar you earned?

A. Yes, sir.

Q. How much were you earning when you got hurt?

A. $190.00 a month.

Q. Before or after the deductions?

A. That was over all.

Q. How much of that $190.00—how much is that a year?

A. About $2200.00, or something like that.

Q. $2280.00. How long had you been making that sum of money?

A. I don't remember rightly. We had just gotten a raise. I couldn't say just exactly how long.

Q. You are a married man?

A. Yes.

Q. This lady at the table is your wife, Mrs. Hunter?

A. Yes.

Q. Mr. Hunter, do you know approximately what you were making before the war—what were they paying——

Gullett: We object——

Q. All right, if they object. It was less.

Gullett: We object to the remark made by counsel, and ask the court to instruct the jury.

Court: You object to the remarks of counsel?

Gullett: I object to the remark of counsel with reference to my objection.

Court: I didn't hear it. State what it is.

Webb: I stated to the Court that I was expecting to prove it was less before the war.

Court: Overruled.

Webb: How much was it before the war?

A. I would say around $140.00.

Gullett: We object to that as being irrelevant and immaterial and of no probative force in this case, and we ask the court to instruct the jury not to consider the ques-[fol 85] tion or answer.

Court: Objection overruled.

Gullett: We except. And make the further objection that there is no pleading in this case to authorize the question or answer.

Court: Objection overruled.

Gullett: We except.

Webb: Have you got the amount of money you paid for these medical services and hospital?

A. I don't have them, no; but I imagine we could get them.

Q. Do you know what they are?

A. I know what the hospital is. $145.00 at the Wilson N. Jones and $35.00 a week for the room—I mean, St.

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Vincent's was $145.00. And $35.00 at Wilson N. Jones for eight weeks, and there was always extra charges.

Q. What was the physician's service?

A. I paid him $177.00.

Q. Who?

A. Dr. Stout, for Wilson N. Jones, and Dr. Gleckler's bill was $224.00. That included the operation and his services.

Q. In addition to that, did you pay drug bills?

A. Drug bills in the amount of $15.00 a month, and maybe more.

Q. For how long?

A. I guess about three months.

Mrs. Hunter: Six months.

Gullett: If the Court, please, comes now the defendant, Texas Electric Railway Company—will you retire the jury for a minute?

(Jury retired)

Gullett: Comes the defendant, Texas Electric Railway Company, and moves the Court to instruct Mrs. R. P. Hunter, the wife of the plaintiff, who is now on the stand, [fol. 86] to desist from attempting to convey to the witness in a sufficiently loud tone of voice, or whisper, information pertaining to the matters about which the witness is now being interrogated. The witness was being interrogated by Mr. Webb with reference to certain doctor and hospital bills and expenses pertaining thereto, and the witness testified "three months", and in a loud tone, or loud whisper, the wife of the plaintiff stated it was six months. We here now move the Court to instruct Mrs. Hunter that if she intends to remain in the courtroom to desist from bolstering the testimony of her husband, and in the alternative, she be instructed to be removed from the courtroom.

Woodrow: The lady is the wife of the plaintiff, and can stay at the counsel table and convey that information to her counsel, and she has that right. That is why we want her here so that she might convey us any information. I will have her sit closer.

Gullett: Let the record show it was loud enough——

Court: The Court didn't see or hear any of the matter that is brought before me. If the wife of the plaintiff attempted to communicate with the witness on the stand,

the Court is not aware of it. However, I will instruct Mrs. Hunter that it is not at all proper to convey to the witness any information. I don't see how she could.

Gullett: The statement was made loud enough to hear it.

Court: If it is repeated, I will have her placed under the rule. She can offer information to her attorneys, but not within the hearing of the jury.

(Jury brought in)

Court: Proceed, gentlemen.

[fol. 87] Webb: One other question and we are through with this witness for the present. Mr. Hunter, did you have a watch on the day you had the collision?

A. Yes, sir.

Q. Where was your watch with reference to your left breast?

A. On the left breast pocket.

Q. What happened to that watch?

A. It was pretty well busted up.

Q. Do you know what lick it was that busted your watch?

A. I don't know what it was, but something hit me and busted the watch, and clear across the stomach.

Q. That is all.

Cross-examination.

By Mr. Gullett:

Q. Now then, Mr. Hunter, at the outset, I believe you testified you had been working for the Texas Traction Company and the Texas Electric Railway Company for how many years?

A. About thirty-four years.

Q. Prior to that time, you worked for the old Sherman-Denison Railway Company?

A. Yes, sir.

Q. What year did you start working for the Sherman-Denison Railroad Company?

A. March, 1907.

Q. Did the interurban line, on the day of the collision, run along the same line, or was it different?

A. Same line.

Q. In other words, you had been working over that line between Sherman and Denison for approximately 31 years, I believe you testified?

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A. Thirty-seven years.

Q. During all of that time you had been employed as a motorman?

A. With the exception of eight years in the dispatcher's office.

Q. You testified awhile ago that those were one-man [fol. 88] cars. It is not all interurban cars that are one-man cars?

A. All I know anything about.

Q. How long had that been in practice?

A. Since about 1932, if I am not mistaken.

Q. Something like ten or eleven years before the accident?

A. Yes, sir. I could be mistaken.

Q. The fact there was just one man on the car was nothing new?

A. Practically nothing new.

Q. In addition to your experience as a motorman and interurban operator, you had experience as a dispatcher?

A. That's right.

Q. What is a dispatcher? Tell the jury what the duties are.

A. Dispatch cars, tell them where they should meet and get orders.

Q. In other words, the dispatcher is what is known as one of the operating officers of the railroad?

A. That's right.

Q. He holds an official position?

A. Yes, sir.

Q. You had held that official position with this company for practically eight years?

A. Yes, sir.

Q. You are familiar with the method of operation of these cars and how this company carried on this business?

A. Yes, sir.

Q. Not only as an employee but in the capacity of an official of the company?

A. Yes.

Q. Now, Mr. Hunter, you have, do you not, a printed form known as a time card, is that correct?

A. That's right.

Q. Explain to the jury what is meant, or what the function of the time card is?

A. That shows your meeting points—your time—leaving terminals and time of arrival *to* the other terminal.

[fol. 89] Q. Was there not in effect, at the time of the collision, a time card?

A. Yes, sir.

Q. How long had that card been in effect?

A. That particular card, something like six months.

Q. How long had you been working on this particular run that you held that day, prior to the time of the accident?

A. About a year and a half.

Q. About a year and a half, and had been operating under this particular time card for about six months. Now, Mr. Hunter, when the times of the cars are changed, another and different time card is put into effect?

A. Yes, sir.

Q. For six months then, under the time card then in effect, you had been making this same number of trips to Denison on the same time?

A. Yes, sir.

Q. Will you explain to the jury what is meant by "meeting points"?

A. When two cars are supposed to meet and pass.

Q. Where two opposite cars pass. Just how exactly are those meeting points arrived at? Time card or train order meet?

A. Time card.

Q. What is meant by a positive meet?

A. That is a train order meet.

Q. What is meant by time card meet?

A. That is a regular meet.

A. A positive meet or train order meet, except when there is some variation from the time card?

A. Yes.

Q. For instance, if a man leaves Sherman at 8:15 and does not get out until 8:45, the car he is going to meet comes south from Denison. When it comes to the meeting place, what does the southbound car do?

A. Supposed to call the dispatcher.

[fol. 90] Q. If he is there waiting for you, he would still call the dispatcher?

A. Yes, sir.

BLEED THROUGH– POOR COPY

Q. If the car is at the meeting point, then he never calls the dispatcher?

A. That's right.

Q. Going back to the day the collision occurred, what time did you go to work?

A. 7:05.

Q. 7:05 in the morning. How many round trips were you supposed to make between Sherman and Denison?

A. Five.

Q. Mr. Hunter, what trip did you testify awhile ago that this accident occurred?

A. On the fourth trip.

Q. On the fourth trip. Now, then, Mr. Hunter, what time were you due out of Sherman on your fourth trip to Denison?

A. 2:30.

Q. Mr. Hunter, I hand you herewith this instrument and ask you to tell what it is?

A. It is a time card.

Q. Is that your name written on there—"R. P. Hunter"?

A. Yes.

Q. Is that a copy of the time card that was in effect at the time this collision occurred?

A. Yes, sir.

Q. Were you furnished that time card by the company?

A. Yes.

Q. On the occasion in question, did you have a copy of that time card?

A. Yes, sir.

Q. The rules require that while you were operating the car you had to have a time card?

A. Yes, sir.

Q. Where did you keep it, Mr. Hunter?

A. Kept it up in front of me, there on a hook.

Q. All right, sir. At the time this accident occurred, a copy of this time card was on the hook where you could see it?

A. Yes, sir.

Q. Will you take that just a minute, Mr. Hunter? Wait a minute, before I get to that. What is meant by classification signals in the railroad parley?

[fol. 91] A. If I understand the question, you mean white flags. Green flags for second section.

Q. What signal—in other words, classification signal is a signal display on the first car in front, at the top?

A. Yes.

Q. In the daytime by flags and by lights at night?

A. Yes, that's right.

Q. What do you mean by "marks"?

A. If you set two flags on the front part of the car, and at night by green or red light.

Q. A mark is no more than a light?

A. That's right.

Q. Do regular trains carry marks?

A. Not unless there is a section following.

Q. A second or third section following?

A. That's right.

Q. Regular scheduled car with a section following carries what kind of mark?

A. Green flag or green light.

Q. If there is three sections, that would be four in all, the second would carry a green flag or light?

A. Yes.

Q. And the third one would carry a green flag or light?

A. That's right.

Q. And the last one would not display any markers?

A. That's right.

Q. When you came to a meeting place, I will ask if it was your duty, under the rules—strike that—Now then, Mr. Hunter, the interurbans are round in front?

A. Yes, they are round in front.

Q. The motorman sets on the left hand side?

A. Yes, sir.

Q. Is that correct?

A. Yes.

Q. On the front of the car about this high up, what is there, on the outside?

[fol. 92] A. Up above his head?

Q. No. Right below here, below the motorman's window?

A. A train number box.

Q. Explain to the jury what a train number box is?

A. It is the number of your train.

Q. What was your number of the train going north?

A. 58.

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Q. What was the number of the car coming south?

A. 15.

Q. When you come to a meeting point, I will ask you if it isn't a fact that you have to definitely ascertain two things; first, what number is designated on the train order box, and, whether or not that train is carrying signals?

A. Yes.

Q. You have to do that? It is a positive rule of that company and you have been doing that for 30 years?

A. Yes, sir.

Q. On this occasion at Woodlake, you testified you looked over your shoulder and thought you saw the man there?

A. Yes, sir.

Q. On that occasion you did not definitely ascertain whether or not he was train 15 or whether or not he was carrying any signals?

A. I did not.

Q. Why didn't you?

A. Because I thought he was in.

Q. You thought he was in?

A. Yes.

Q. In other words, you disregarded the rules and didn't ascertain whether or not he was carrying signals?

A. It is like I said.

Q. You didn't ascertain that that man had classification signals or car classification?

A. No.

Q. Now, getting back to this time card. One question previous to that: what was the number of the train you collided with, coming south?

A. 15.

[fol. 93] Q. And you were on Train No. 58, is that correct?

A. Yes.

Q. With your permission, I will ask you to look at "58". (Referring to time card). When you came over from Sherman to Denison, or when you got from Denison to Sherman, did you or did you not have to sign a register?

A. I had to put up a register sheet.

Q. And before you left Sherman on that particular afternoon, you had to check to see if other cars had to pass?

A. No.

Q. Did you or did you not, on this particular afternoon, determine whether or not other cars had passed?

A. No, because I knew they were in.

Q. Getting over to the time card, Mr. Hunter. No. 58 leaving Sherman at 2:30. If the Court, please, I introduce in evidence at this time the time card of the Texas Electric Railway Company, which has been testified to by the witness that it was in effect at that time, and ask that the same be marked. (Marked Defendant's Exhibit No. 1, of which a photostatic copy is attached to this Statement of Facts.—Reporter.)

Q. Number 58 is shown on there. There is some writing in the square showing No. 58. What is meant by the bold face type and heavy face type?

A. Meeting point.

Q. What is meant by this bold face type?

A. That is the meeting point.

Q. Does that mean the time you left Sherman?

A. Yes, sir.

Q. Just above that, there *is* certain numbers in type not so bold?

A. Yes.

Q. What does that mean?

A. Trains I am supposed to meet in Sherman.

Q. Did you meet them in Sherman?

A. Yes, sir.

[fol. 94] Q. And they had all passed when you started out at 2:30?

A. Yes, sir.

Q. Then you proceeded out to Richards. You were due there at 2:38?

A. Yes, sir.

Q. There is nothing written in that block?

A. No, sir.

Q. That means you did not have a meeting point there?

A. Yes.

Q. You proceeded out to Sap? There is nothing in there, no small figures above the 2:43, is there?

A. That's right.

Q. Then you were proceeding to Sap, to Woodlake. What time were you due at Woodlake?

A. 2:47.

Q. What is written above the 2:47?

A. 15.

Q. What does that mean?

A. It means I had a meeting point at Woodlake.

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Q. It means you had a meeting point at Woodlake with No. 15?

A. That's right.

Q. Were you not supposed to stay until No. 15 showed up, and you had to call the dispatcher?

A. That's right.

Q. Did you on this occasion call the dispatcher?

A. No.

Q. Was No. 15, on this occasion, on the side tract?

A. No.

Q. That is known as spring switches at Woodlake?

A. Yes.

Q. You did not have to go out and throw a switch?

A. Yes.

Q. And goes out to the track on the right side?

A. Yes.

Q. And coming up, you come on what is called the main line?

A. They are both called main lines.

Q. They are both called main lines. No. 15 was not there and you did not call the dispatcher?

A. No.

Q. All right, how far did you proceed north of Woodlake before you saw Train 15 coming?

A. Three-fourths of a mile, I would say.

Q. Is that a straight tract or curved?

A. On a curve.

[fol. 95] Q. Now, No. 15 was coming along in a southerly direction. That is where he is supposed to be?

A. Yes, sir.

Q. At that time, you were suposed to be waiting back at Woodlake?

A. Yes, sir.

Q. And you didn't wait for him at Woodlake, as the time card required you to do?

A. I didn't, no.

Q. (To jury) Gentlemen of the Jury, I direct your attention to No. 58, and will pass it around for you to see. (To witness) Now, Mr. Hunter, Train No. 15, what was the man's name operating 15?

A. T. N. Maxwell.

Q. And you passed that meeting point and met him down at the curve?

A. Yes.

Q. Mr. Hunter, can you give this jury any explanation as to why you passed that meeting point without waiting for that man, as that card required?

A. Because I thought I saw him in there.

Q. Because you thought you saw him in there. Why didn't you on that occasion—you didn't ascertain he was not carrying *no* signals?

A. I rode up there and stopped about once or twice. Every two or three weeks he wouldn't be there.

Q. Once or twice every two or three weeks you would call the dispatcher?

A. Yes.

Q. On this occasion, you didn't. You don't mean to convey that since there wasn't any interurban car waiting there gave you the right to proceed right along?

A. I simply thought I saw him.

Q. You are trying to convey to the jury that just because there wasn't any interurban waiting there, you had the right to proceed?

Webb: We object to that as argumentative.

[fol. 96] Court: Sustain the objection.

Gullett: If there had been a display of white flags, would that give you the right to pass that point?

A. No.

Q. Sir?

A. No.

Q. You say you went by there and you thought you saw him over there? It could have been an extra?

A. It could have been.

Q. And if it was an extra, you would have gone down and hit this fellow just like you did this car?

A. Yes.

Q. Now, Mr. Hunter, take the time card and tell the jury what time you left Sherman on your first run in the morning?

A. 7:05.

Q. What time did you leave Sherman on your next run?

A. 9:08.

Q. What time did you leave on the third run?

A. 11:08.

Q. What time did you leave on your fourth run?

A. 1:08.

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Q. What time did you leave on your fifth run?

A. 2:30.

Q. I believe you testified this was your fourth trip. What time did you leave on your first run?

A. 7:05.

Q. Second run?

A. 9:08.

Q. Third run?

A. 11:08.

Q. Fourth run?

A. 1:08.

Q. Fifth run?

A. 2:30.

Q. We are still not together. You testified this was your fourth trip?

A. I was mistaken. It was the fifth trip.

Q. I understand. That is a small matter. On all other occasions, you left 8 minutes after the hour?

A. Except 7:05.

Q. That is the only time you left Sherman 30 minutes after the hour?

A. That's right.

Q. You had been making this run for six months?

A. Since October, the date of the time card.

[fol. 97] Q. What day did this accident happen?

A. May 2nd.

Q. During all that time you had been following this regular schedule that you outlined to the jury, leaving Sherman at those various times?

A. Yes, sir.

Q. This is the only time in the six months' period that you failed to stop and wait for No. 15 at Woodlake, or call the dispatcher?

A. That's right.

Q. If you had failed to call the dispatcher or waited at Woodlake prior to May 2nd, you would have had the accident prior to this time?

A. Yes, the chances are.

Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake, as the time card and rules required you to, this would not have happened?

Webb: We think that is argumentative.
Court: Overruled.
Webb: We except.

A. No.

Gullett: I believe you testified awhile ago that the man's name on the southbound car was a man by the name of Maxwell?

A. That's right.
Q. You testified that Maxwell reversed his car?
A. Yes, sir.
Q. Isn't it a fact that the quickest way to stop the car is to reverse the car?
A. It is not.
Q. Will that stop the car?
A. It will finally stop, yes.
Q. What is the purpose of reversing the power?
A. To back up.
Q. Do you mean to tell me that if you will go forward and then you reverse the car, that that won't stop before it started back up?
A. It will finally stop after so long a time.
[fol. 98] Q. How long a time?
A. That is according to track condition, up grade or down.
Q. And you were going down grade, and you had gone ¾ of a mile from Woodlake when this happened?
A. Yes.
Q. On this particular occasion, did you let off or take on any passengers at Woodlake?
A. I don't think I did. I don't remember anyone getting on or off.
Q. I believe you told the jury that Maxwell did not set his air or set his brakes?
A. I did, yes.
Q. How far were you from Maxwell?
A. Around 700 feet.
Q. Now then, the motorman or operator sits on the left hand side of the front of the car, doesn't he?
A. Yes.
Q. Immediately to his left in front of him is what is known as a control box?

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A. Yes, sir.

Q. Immediately to his right in front of him is what is known as the air brake?

A. Air lever.

Q. The control box has a handle on the top of it, and moves around this way (indicating)?

A. Yes, sir.

Q. And this air brake has a lever as long as that pencil?

A. Eight or nine inches long.

Q. That is operated with your right hand?

A. Yes.

Q. When the car is running, and the air is not applied, it sets in a stationary position?

A. Yes, sir.

Q. When you apply the air, do you move it to the right or left?

A. Right.

Q. Certainly you don't mean to tell the jury that you can tell 700 feet away that Maxwell did not reach——

A. I could tell by the action of the car.

Q. That is the only thing you base your answer on?

A. That's right.

[fol. 99] Q. You didn't see him——

A. That is the only way.

Q. The only way you judge is from the actions of the car?

A. That's right.

Q. Now, Mr. Hunter, those cars, did they hit at the point of the curve or straight line?

A. At a curve.

Q. Your car was facing north and you were sitting on the left hand side?

A. Yes, sir.

Q. The man coming south, as he was coming to the curve, was sitting on his lefthand side?

A. That's right.

Q. And you say Mr. Maxwell reversed his car and then jumped?

A. He did.

Q. And you didn't jump?

A. No.

Q. Well, now, Mr. Hunter, you testified about knowing all about what Maxwell was doing by the action of the car, is that right?

A. That's right.

Q. You couldn't be mistaken about that at all?

A. No.

Q. Now, then, Mr. Hunter, if you hadn't run that meeting point Maxwell wouldn't have had to jump?

Woodrow: We object to that as argumentative.

Court: Sustained.

Gullett: Why did Mr. Maxwell jump?

A. He didn't have to.

Q. Why—all right.

Woodrow: It is invading the province of the jury. The question is for the jury to determine.

Gullett: What caused the accident, Mr. Hunter?

Woodrow: That is what the question——

Gullett. I withdraw it. (To witness) What caused the accident?

A. Two cars collided.

Q. What caused the two cars to collide?

A. Because they were on single tracts.

[fol. 100] Q. Is there any other reason, Mr. Hunter?

A. Because they passed the meeting point.

Q. Who did?

A. I did.

Q. In the last analysis, that is what caused it? That is the answer?

A. Yes.

Woodrow: That question is to be submitted to the jury, and is a conclusion of the witness, and invades the province of the jury, and also argumentative. I will withdraw the objection. Let him answer.

Court: Thank you.

Gullett: Now, Mr. Hunter, how long was it after the accident before you were taken from the scene of the accident?

A. I really don't know. I would say about two hours.

Q. Do you know a gentleman by the name of L. T. Young?

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A. Yes, sir.
Q. And Mr. Armour Wooley?
A. Yes.
Q. And who is J. T. Young?
A. L. T. Young.
Q. Yes?
A. Shop foreman at Denison.
Q. Who is Mr. Wooley?
A. Assistant job foreman in Denison.
Q. Assistant job foreman in Denison. Do you remember talking to those two gentlemen on that occasion?
A. I remember seeing them, yes.
Q. Did you have any conversation with them?
A. Very little.
Q. Isn't it a fact, on that occasion, you told both of them this: "This whole thing is my fault and I hate to wind up my career this way"?
A. I did not.
Q. You didn't tell either gentlemen that?
A. No.
Q. Mr. Webb asked you this question, he asked you if you had any block signals. Explain to the jury, if you know, what is meant by block signals?
[fol. 101] A. It is an automatic light, set up showing red —it would have shown red in my face of the other fellow coming.
Q. During all this time, to May 2, 1944, has there been installed, from Sherman to Denison, any block signals?
A. From Woodlake to Denison, only.
Q. Were there block signals then?
A. Yes.
Q. When?
A. Between the years 1926 and 1930.
Q. During the last twelve years of your running a car between Sherman and Denison, was there any block signals in operation between Woodlake and Denison?
A. No.
Q. You operated over that road twelve years without them?
A. Approximately, yes, sir.
Q. You were governed by what is known in railroad parlance as manual blocks?
A. I guess so.

Q. Isn't it a fact that manual blocks is the same thing that you and I refer to as time card?

A. Time card, that's right, yes.

Q. Mr. Hunter, was this run you had between Denison and Sherman on this occasion, is that what is known among the employees and operators as an "easy run" or "hard run"?

A. No.

Woodrow: We object to that as calling for a conclusion.

Gullett: I think I can lead up to that. If I don't, you may instruct the jury to disregard it.

Court: Proceed.

Q. Was it known as an easy or hard run?

A. It was known as fairly easy.

Q. You mean it was easy to make the time?

A. It wasn't easy to make the time, but then you didn't have the distance to go. That is why it is called an easy run.

[fol. 102] Q. You had to keep humping it to make the time?

A. That's right.

Q. Do you mean to testify that you had to keep humping it all the time to make the time?

A. Yes.

Q. How long does it take one of the interurban cars to go full speed?

A. Level tract, you will be going full speed, I would say, in six or seven hundred feet.

Q. But you were not going its full speed on this occasion?

A. I was not.

Q. How fast would you say you were running on this occasion?

A. When I first saw the car?

Q. Yes, sir?

A. Twenty miles an hour.

Q. You remember your deposition being made?

A. Yes, sir.

Q. You were asked this: "Mr. Hunter, how fast were you operating your car the first time you saw the Maxwell car? Your answer was: "I would say I was going 25 miles an hour." Is that right?

A. I guess it was, yes, sir.

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Q. I believe you said you were taken from the scene of the collision to the Wilson Jones Hospital in Sherman?

A. That's right.

Q. And the doctor who waited on you was Dr. Gleckler?

A. Yes.

Q. How long were you at Wilson N. Jones Hospital?

A. The Wilson N. Jones?

Q. I mean St. Vincent's?

A. About two days over three weeks.

Q. Which one of your limbs, that you testified in answer to Mr. Webb's questions, was injured?

A. The left one.

Q. Had you prior to this time had any trouble with your left leg?

A. A spider bite.

Q. Did you have blood poison?

A. Yes, sir.

Q. When was that?

A. If I am not mistaken, back in 1926.

[fol. 103] Q. How long were you in the hospital with that?

A. A little over two weeks in the hospital, but I was home six weeks.

Q. Were you ever bothered with varicose veins in your left leg?

A. Not until then.

Q. When?

A. The spider bite.

Q. After that you suffered from that?

A. I don't suffer.

Q. What did you suffer?

A. The veins were blocked.

Q. That is stripping them?

A. They call it blocked.

Q. That was in May, and you stayed in this hospital over three weeks?

A. Yes, sir.

Q. When was the next time?

A. September 29, 1944.

Q. Isn't a fact that on that occasion you were taken to the hospital for pneumonia?

A. Yes.

Q. You don't attribute this pneumonia to this accident back in May?

A. No.

Q. How long were you in the hospital?

A. From Friday to Friday—eight days.

Q. When was the next time you went to the hospital?

A. A week from that day.

Q. What was that for?

A. For heart trouble.

Q. You spoke a while ago of your watch in your left pocket of your trousers?

A. No, in my vest.

Q. In other words, what I am trying to get at, the watch was in your left vest pocket?

A. The low part of my vest.

Q. You say the watch was crushed. How long was it after the accident happened that the doctor diagnosed that you had heart trouble?

A. It was when I made the second trip to the hospital.

Q. In December?

A. No, January of this year.

[fol. 104] Q. Up until January of this year, then, there had never been—the doctor never diagnosed any of your trouble as heart trouble?

A. They never told me it was.

Q. They never told you it was. In answer to Mr. Webb's question, you testified that the accident happened at 2:47 P.M. Is that right?

A. It was 2:49 to be exact. We are due at Woodlake at 2:47, and it was a 2-minute run.

Q. What time did you say you were due at Woodlake?

A. 2:47.

Q. I will ask you if it isn't a fact that you passed there at 2:46?

A. Not according to my time.

Q. Now you say it happened at 2:49. Is that right?

A. That is right, approximately.

Q. You told Mr. Webb it was 2:47 and now you say 2:49?

A. 2:49. I was mistaken on the time. It was an error on my part.

Q. I believe that is all, Mr. Hunter. Thank you.

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Redirect examination.

By Mr. Woodrow:

Q. Mr. Hunter, about this spider bite. When were you bitten by a spider?

A. I believe it was 1926.

Q. How many years ago?

A. Nineteen years ago.

Q. Did you fully recover from it?

A. Yes, sir.

Q. It didn't bust your watch on that occasion?

A. No.

Q. It didn't make you black and blue on your back when you run into this train, or they ran into you?

A. No.

Q. You testified awhile ago that this company had formerly maintained a block system?

A. Yes, sir, from Woodlake to Denison.

Q. Under the former program of safety, did they have a signal at Woodlake to stop?

[fols. 105-110] Gullett: Just a minute. We object to that as being immaterial and irrelevant.

Woodrow: He brought it out that they did have.

Gullett: Twelve years ago.

Court: Are you inquiring about a situation about twelve years ago?

Woodrow: Only to something he brought up. (Witness leaves the witness stand.)

[fol. 111] R. P. Hunter, the plaintiff, recalled to the witness stand, testified as follows:

Direct examination.

By Mr. Woodrow:

Q. I believe my inquiry from you when you were on the stand was about this spider bite. How long ago was that?

A. I believe it was in 1926.

Q. You were bitten right in this same institution's office?

A. Yes, sir.

Q. While you were performing your duty toward them?

A. Yes.

Q. They didn't compensate you for that?

A. No.

Q. If any injury now persists, it was still while you were in their employ and performing the duties of this company?

A. Yes.

Q. The evidence exhibited to you, this thing here (referring to Defendant's Exhibit No. 1, being the Time Card) —they have inquired about it and that you should analyze it and look over everything on that sheet. What other duties did they have you perform on the occasion you received this injury? What other things you had to do?

A. I was operating the car and collecting fares.

Q. Operating the car. Consisting of what?

A. Stopping and starting.

Q. And what else?

A. Collecting fares.

Q. Did you have a cash register on there?

A. No.

Q. How did you handle your cash?

A. With——

Q. Have to keep books on the train?

A. No. We had duplicate cash fare receipts.

Q. Had to issue receipts while you were operating the train?

A. Yes, sir.

[fol. 112] Q. What record did you have of those receipts?

A. They were made in duplicate, one given to the passenger and one given to the company.

Q. You had to make a receipt and keep one and give them one?

A. Yes.

Q. And make change?

A. Yes, sir.

Q. And let off passengers?

Gullett: Object to leading.

A. Let off passengers, and if the trolley got off, I had to get off and put it on the line.

Q. How did you do that?

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A. Get off the car and put it on the line. It had a rope.

Q. Was there anything in the operation of the car that you didn't have to do?

A. Not a thing.

Q. You testified here, in answer to Mr. Gullett's questions, that at some prior time they had a red signal to stop, if there was danger?

A. Yes, sir, Woodlake to Denison.

Q. They took that off?

A. Yes, sir.

Q. And left you without it?

A. Yes.

Q. It was not there on this occasion?

A. No.

Q. Do you have anything to do with the promulgation of these rules and regulations that Mr. Gullett is talking about?

A. I didn't make them, no.

Q. On this side where this fellow Maxwell—is it Maxwell?

A. T. N. Maxwell.

Q. Was supposed to have been when you went by, and how frequently was he absent from that place?

A. I would say about once every two weeks.

Q. When you got there, would you see whether or not he was there?

A. I rode up and stopped.

[fol. 113] Q. Was there anything to confused you in that——

Gullett: We object to the leading.

Woodrow: Was there anything there when you looked to see whether this car was there?

A. Yes, sir.

Q. That you could have seen?

A. There was a telephone booth.

Q. What color was it?

A. Yellow.

Q. About the same color as these cars?

Gullett: We object to the leading and suggesting.

Woodrow: Was there any similarity of the color of that and the construction of what the company had there?

A. It was similar.

Q. Do you know why this fellow Maxwell was not there as he should have been?

Gullett: Object as calling for a conclusion.

Court: Sustained.

Woodrow: Just a minute, now. They put on proof that he was supposed to be there at that time.

Court: Sustained.

Woodrow: He had been there every other occasion except how many times?

A. About once every two weeks.

Q. Did he have time to be on the schedule that they were talking about?

A. Yes.

Q. And he was not there on time?

A. Not that day, no.

Q. And if he had been there, there wouldn't have been any collision?

A. No.

Q. It was not your duty to see that he was there?

Gullett: We object to leading. Let him answer.

Woodrow: You were not running the company?

A. No.

Gullett: We ask the Court to move the witness to answer.

Court: The question is withdrawn.

[fol. 114] Q. Something was said about reversing the operation of those wheels on Maxwell's car. What do you mean by reversing that car?

A. That is reversing the current—putting the current in a backward condition.

Q. What would that do to the wheels of Maxwell's car?

A. Spin them.

Q. In what direction?

A. Backwards.

Q. How long—I believe you testified you have been in the employ of this company 38 years, and you actually operated and had to do mechanically with the operation of these cars about 30 years?

A. Altogether, yes.

Q. You are acquainted with the manner of its operation?

A. Yes, sir.

BLEED THROUGH- POOR COPY

Q. You knew the effect of that operation and this operation with reference to the propelling and stopping of the car?

A. Yes.

Q. What effect, if any, was visible to you, or came to your knowledge, of the reversing of the current through motors on Maxwell's car? What effect?

A. The car gave just a jerk.

Q. Just gave a jerk. What did it do after it jerked?

A. In an instant it was on its way again at the same speed.

Q. Right toward you?

A. Yes.

Q. Did it have any effect on your car? I mean on your lights, blow anything out?

A. It dimmed the lights out.

Q. Put the light out?

A. Dimmed them—didn't have any on.

Q. About the current?

A. I didn't have any current, knocked the breaker in the power.

Q. What do you mean?

A. These lines are in sections. It is a circuit breaker. [fol. 115] It is a strip of wood. It breaks the current.

Q. Something like a half current?

A. Yes. From Woodlake is one section, and if the power goes out, the rest operates all right. That breaker maintains a certain number of miles in between.

Q. Whatever he did cut your current?

A. Knocked the breaker off.

Q. Of your car?

A. Of that line from Woodlake to Denison.

Q. You knew that of your own knowledge?

A. Yes, sir.

Q. Does your air brakes—do they operate by electricity or are they independent of your current?

A. They don't have anything to do with the current. They operate by hand.

Q. The question of being no power—if there is no power, the reversing of his car would not stop it?

A. No.

Q. There wouldn't be any reversing if he blew the breaker?

A. He didn't have any power.

Q. Then he didn't have anything to stop?

A. Practically nothing.

Q. You would have and do have the air brakes at your command?

A. Yes, sir.

Q. What he did, of your own knowledge, was to deprive you and him both of any operation of electricity?

A. Yes, sir.

Q. If he hadn't done that he could have used some of his current to stop it?

A. Yes.

Q. The operation of the air brakes, what does it do to the wheels?

A. It presses the brake shoe against the wheel and stops the car, checks the speed.

Q. Stops the wheels from revolving?

A. Yes.

Q. To turn your current backward and revolving it another way, and putting your brakes on, is contrary to each other?

[fol. 116] A. That's right.

Q. One contrary to the other doesn't allow much?

A. Not much.

Q. If you want to stop your car, you should put your air brakes on?

A. Yes.

Q. And not use your current?

A. Yes.

Q. From your experience in operating these cars for about 30 years, could you or not determine whether he applied his air brakes?

A. He did not.

Q. If he had applied his air brakes, what would his car have done that he didn't do when you saw him?

A. It would have stopped.

Q. At what distance?

A. He could have stopped within 500 feet.

Q. And he was 700 feet away?

A. Between 700 or 800 feet.

Q. I believe you testified you stopped at 100 feet.

A. As near as I remember.

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Q. That would have left 100 feet between you and him when you stopped?

A. Practically.

Q. The question asked you was, "What caused this collision?" If he had stayed with his car like you had, and applied his air brakes, and if he hadn't abandoned that car to run on without him——

Gullett: We object to that as argumentative, and leading.

Woodrow: Same question that they asked him.

Court: Argumentative. Sustain the objection.

Q. What caused you to run together?

A. By him not applying his air.

Q. What did he do?

A. He opened his door and jumped.

Q. Abandoned his passengers and jumped without interruption of that speed?

A. Yes.

[fol. 117] Q. Back at Woodlake, when you were both seeing the conditions as then existed, what did you do that he didn't do to stop?

A. I applied my air.

Q. Did you stay with your vehicle?

A. Yes, sir.

Q. If Maxwell had been on this very schedule you were talking about, he would have been where you thought you saw him?

A. Yes.

Q. And if they had retained the safety device they had before with the red signal, you would have had warning of it?

Gullett: We object him—going into a matter too remote—twelve years ago.

Woodrow: I will withdraw it. It was brought about by Mr. Gullett himself.

Court: Are you referring to the block signal system?

Woodrow: Yes.

Court: All right.

Woodrow: If they had retained that signal showing that the road was not clear ahead of you, you would have stopped, wouldn't you?

A. Yes, sir.

Q. Prior to the time you received these injuries, what was the condition of your digestion? Was it good or bad?

A. It was good.

Q. After the injury, what has been the condition of your digestion?

A. It has been very bad.

Q. Prior to these injuries, did you have any pain around your heart or difficulty in breathing?

A. No.

Q. After the injury, did you have any pains around your heart and difficulty in breathing?

A. It started about a week afterwards, at the hospital.

Q. They examined you then, before the operation, to [fol. 118] see if your heart was all right then?

A. Yes.

Q. How long after that had they discovered that this heart was involved?

A. The first I knew of it was along the first of January.

Q. When they diagnosed it?

A. Yes, sir.

Q. But these symptoms, pains and indigestion, and all those things informed you of your heart condition, when did you know that they came about?

Gullett: We object to leading and suggesting.

Court: Overruled.

Gullett: We except.

A. It started about a week after I was injured.

Q. Had you had any of those symptoms prior to the injury?

A. No.

Q. Were you strong and robust, or were you weak and sickly?

A. I was pretty strong and healthy.

Q. Able to do the work for this company, were you or were you not?

A. I was, yes.

Q. They made no complaint about your physical condition as to the manner of your conducting your work, had they?

A. No.

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Q. As far as this company was concerned, your physical condition was acceptable to them, was it not?

A. It was okay.

Q. But afterwards have you been able to perform any labor for hire?

A. No.

Q. How about your nights? Do you experience good rest or are you in pain at night?

A. I don't sleep good.

Q. Before this collision, was the state of your nervous system—were you nervous or not?

[fol. 119] A. No, I was not nervous.

Q. After the injury, what was the condition of your nerves?

A. Nervous. I haven't been able to sleep. I stay awake at night for two or three or four hours at a time.

Q. Now when you first observed this car propelled by Maxwell and it just momentarily hesitated, how far up the road from you was it?

A. I would say about 700 feet.

Q. He was 700 feet when he commenced—when he reversed his car?

A. Yes.

Q. Was that the time your current was completely cut off?

A. It cut off when he reversed his car.

Q. About 700 feet from you. Now, at the speed he was traveling and the brakes—air brakes at his command—by the proper use of those air brakes can you tell the jury whether or not he could stop the car?

Gullett: Object to that as calling for a conclusion of the witness, and invading the province of the jury.

Q. He qualified it. He said he has had 30 years' experience.

Court: Overruled.

Gullett: We except.

Woodrow: And had he stopped there wouldn't have been any collision?

A. There wouldn't have been any collision.

Cross-examination.

By Mr. Gullett:

Q. The fact that you run that meeting point didn't have anything to do with that collision?

A. That's right.

Q. Didn't have anything to do with it?

A. It probably did.

Q. Sir?

A. Yes.

Q. As a matter of fact, this whole thing was brought about by you not stopping at the meeting point?

[fol. 120] A. It could have been avoided.

Woodrow: We object to that as invading the province of the jury.

Gullett: It is cross-examination.

Court: Sustain the objection.

Gullett: We except. Mr. Hunter, you had run a positive meet?

A. I got by.

Q. I didn't ask you that. You had run a positive meet?

A. Yes, sir.

Q. And you went down ¾th of a mile down the track where you were not supposed to be?

A. Yes.

Q. And if you had stayed at Woodlake, it wouldn't have happened?

A. Yes.

Q. It was your positive duty to ascertain whether or not he was there?

A. I thought——

Q. I didn't ask you that.

Webb: Let the witness answer.

Court: Overrule the objection.

Gullett: It was your duty under the rules to ascertain whether or not No. 15 was there?

A. Yes, sir.

Q. Was actually there?

A. Yes.

Q. It was your duty not only to ascertain that No. 15 was there but it was your duty to ascertain that he was not carrying any signals?

A. Yes.

Q. They interrogated you about the amount of work you had to do. How long have those one-man car operations been in existence?

A. I would say ten years.

Q. Then you had been doing that same work for ten years?

A. Yes, under different circumstances.

Q. Under what circumstances?

[fol. 121] A. At this time we were handling ten passengers to one.

Q. On this particular trip you had fourteen passengers?

A. I did say 15 or 20, but I was speaking as a whole.

Q. And you didn't have a passenger to get off at Woodlake?

A. No.

Q. And you say you stopped at Woodlake?

A. Yes.

Q. And you did not ascertain whether or not he was there?

A. I thought he was in there. I thought I saw him.

Q. Well, Mr. Hunter, as a matter of fact, you didn't see him and you didn't ascertain whether that was the car you were looking for?

A. That's right.

Q. There could have been an extra in there?

A. Yes.

Q. And had there been an extra, you would have had to wait for No. 15?

A. Yes.

Q. And if they carried signals, you would have to wait for the next one?

A. Yes.

Q. And there was nothing you had to do. You didn't do anything with reference to ascertaining as to whether you can pass there or not?

Woodrow: We object to the repetition.

Court: Sustained.

Gullett: Just what did you do to ascertain whether or not No. 15 was there?

A. I stopped there and waited there a half minute and looked over my shoulders, and said "There he is".

Q. You didn't look for any signal?

A. He didn't blow any.

Q. Are you supposed to blow signals when you pass?

A. If he was carrying a green flag, he does.

Q. You didn't find out whether he had a green flag or not?

Woodrow: Object to the repetition.

[fol. 122] Court: Sustained.

Gullett: Those block signals had been in operation for twelve years?

Woodrow: We object to repetition.

Gullett: I have the right to ask the question. Those signals had not been there for 12 years, and you had been working over that same track all that time?

A. Yes.

Q. I believe you testified this morning that right there on the car on the clip, you had this time card to meet 15?

A. Yes, sir.

Q. Why did you say a block signal would have stopped you when a time card didn't?

A. Because there would have been a red light.

Q. You say Mr. Maxwell reversed his car and never put on his brakes?

A. Yes, sir.

Q. I believe you testified in answer to Mr. Woodrow's interrogatory that you didn't have the power on?

A. I did not.

Q. And didn't have the light on?

A. The lights were not turned on the car.

Q. And you say it knocked the breaker out at Woodlake? How do you know that?

A. From the action of his car.

Q. You mean to tell he reversed his car and threw back into going head?

A. He did not.

Q. He never slackened his speed?

A. He did not.

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Q. How could you tell from the action of your car that the breaker was out at Woodlake?

A. Because his car came at the same speed.

Q. You testified he was going on an upgrade?

A. Slightly up grade.

Q. And his car came on the same speed. How do you [fol. 123] account for that?

A. Because it was running wild.

Q. What do you mean?

A. No air brakes—no air on it—no power to check it.

Q. And he kept on coming on up hill at the same speed without any power?

A. Yes.

Q. You were sitting up in front of the car on the left-hand side. The front is glassed in?

A. Yes, sir.

Q. It is also glassed in on the side?

A. Yes.

Q. Your visibility was good that day?

A. Yes.

Q. And you drove through the Woodlake pass. Were you looking out when you started out of the north——

A. Looking out where?

Q. Looking ahead?

A. Yes, sir.

Q. Was there anything to obstruct your view from seeing the car?

A. Not until I got to the stop.

Q. Did you see the man when you got to the pass?

A. No.

Q. Then you got down there and looked over your shoulder?

A. Yes, sir.

Q. Had you looked before you went down to that passing track?

A. Yes.

Q. You didn't think you saw him then? What caused you to look over your shoulder?

A. I saw the telephone booth and by looking——

Q. You had passed the telephone booth then?

A. Yes.

Q. And you thought it was a place there by the interurban?

A. It appeared so.

Q. Were you going slow?

A. Yes, sir.

Q. Nothing to obstruct your visibility?

A. No.

Q. You didn't think you saw a car until you got down to the stop?

A. No.

[fol. 124] Q. As you go in, as you pass the signal switch, you are sitting on the lefthand side? You are sitting on the side of the passing track?

A. Yes.

Q. And the telephone booth is further west of that?

A. Yes.

Q. On across that track?

A. Yes.

Q. You have to look across the passing track, or southbound main, to see the booth?

A. Yes, sir.

Q. If you had been looking carefully as you went through that pass, you would have known that man was there or not there?

A. Yes.

Q. Did you always stop at Woodlake?

A. I always did, yes.

Q. Always. And prior to this time you always ascertained whether that car was there or not?

A. Yes, sir.

Q. You say when you saw Maxwell you were some 700 or 800 feet from him?

A. That's right.

Q. And Maxwell was coming south and you were going north, is that right?

A. Yes.

Q. Mr. Maxwell was supposed to be where he was and you were not supposed to be where you were?

A. That's right.

Q. When Mr. Maxwell looked up he saw he was certainly in a position of emergency then, wasn't he?

A. Yes.

Q. And you still tell the jury that Mr. Maxwell didn't set his brakes, or anything, except to reverse his car?

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A. That is all he done.

Q. How far did you roll after you applied the air—I mean your brakes?

A. After I saw him?

Q. Yes.

A. I would say 100 feet.

Q. One hundred feet?

A. Going very slow.

Q. Wait just a minute, Mr. Hunter. Now, Mr. Hunter, you remember when your deposition was taken in this case? [fol. 125] A. Yes.

Q. You were—and you could see Maxwell's car about 800 feet north?

A. Yes, sir.

Q. "Going at the rate—operating the interurban car you were operating on the occasion in question at 25 miles per hour, how quickly could you bring it to a stop?" And your answer was: "I was down within 200 feet. I had it stopped." Do you remember that?

A. I don't remember saying that, but I remember it was 100 feet, at the rate I was going.

Q. "You were operating your car on that occasion at 25 miles per hour, and it can be stopped within 200 feet?" Your answer: "I stopped practically within 200 feet." Is that right?

A. If that is the way it is in the book, it is right.

Q. You say it was 100 and this says it was 200?

A. I am going mostly by memory, and I would say it was 100 feet.

Q. You remember being asked this question? "You hadn't stopped rolling when the collision occurred?" Answer: "You might say I was just stopping." Question: "Were you stopped?" Answer: "You might say that. My car was stopped."

Q. Page 43, Line 8. "You were still rolling when the head-on came about?" And your answer was: "Just barely moving." "Were you barely moving or just stopped? Just stopped." You were not moving?

A. No, not moving.

Q. You didn't mean what you said in the deposition that you were barely moving?

A. I meant just at the point of the collision my car stopped.

Q. What I want to know, was your answer, back when [fol. 126] this deposition was taken, that you were barely moving—now you say it was stopped. Which is correct?
A. I was stopped.
Q. You were stopped?
A. Yes, sir.
Q. I believe that is all.

Redirect examination.

By Mr. Woodrow:

Q. They asked you—if I am tiring you, tell me. They asked you if passing that switch was the sole cause of that collision, meaning that *the* only cause that caused the collision——

Gullett: We object to leading.

Q. I haven't asked the question yet. I am making an explanatory statement.
Court: Ask the question.

Q. In view of that question, would the failure of Maxwell to remain at his post of duty, at the safety of his passengers and the application of the brakes as you did——
Gullett: We object. It is invading the province of the jury.

Q. It's the same question they asked him. Well, they asked you if your passing that switch was the only cause. Was there any other cause?
Gullett: We object to leading and suggesting, and it is invading the province of the jury.

Court: Let him ask the question.
Woodrow: Was there any other cause other than to that, except the passing of the switch?
Gullett: We object.
Woodrow: That is the same question.
Court: Overruled.
[fol. 127] Gullett: We except.

A. If Maxwell had applied his brakes, there wouldn't have been any collision.

Wolfe: We ask the Court to instruct the jury not to consider the answer for any purpose.

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Court: Request denied.

Wolfe: We except.

Woodrow: On that occasion in question, was there anything you did or didn't do on occasions of that kind?

A. No, I think not.

Q. You rode down there and you stopped and looked around?

A. Yes.

Q. Looked over your shoulder?

A. Yes.

Q. This red safety signal you testified was there before, it was there to stop you or another car that should be stopped at that place?

A. Yes, sir.

Q. Did you have anything to do with taking that away or the company taking it away?

Gullett: We object to repetition.

Court: Let him answer.

Gullett: We except.

A. No, I didn't have anything to do with it.

Q. Getting back to the momentum of this car as it approached you, after it hesitated a minute, what would propel it?

A. His speed and the momentum of the car carried it on.

Q. Had he applied his brakes—you are accustomed to them?

A. Yes, sir.

Q. If he had applied the brakes, what effect would it have on it?

A. It would have stopped his car.

Q. Now, the reversing of the current through that mo- [fol. 128] tor and blowing this current—deprive any current of his car and yours—was there anything there to stop that car from going on, and the momentum, and hitting you just like it did?

A. Not a thing, no.

Q. Then it was the blowing of this switch or fuse, coupled with the failure on his part of applying his brakes——

Gullett: We object—it is leading.

Woodrow: I withdraw it. It is leading. I believe that is all.

Recross-examination.

By Mr. Gullett:

Q. You say you didn't do anything different on this occasion than what you have done before. Previously, when Maxwell was not there, you have called the dispatcher?

A. I have.

Q. But you didn't on this occasion?

A. No. I didn't on this occasion.

Q. You had been operating motor cars over this track ever since those signals had been taken out?

A. Yes.

Redirect examination.

By Mr. Woodrow:

Q. You never called the dispatcher when you thought you saw the car?

A. No.

Q. Why didn't you call the dispatcher this time?

A. Because I thought he was there.

Re-cross examination.

By Mr. Gullett:

Q. Why didn't you ascertain whether No. 15 was there?

Woodrow: We object to the repetition.

Court: Sustained.

Gullett: We except.

(Jury retired for lunch)

[fol. 129] (Jury brought in)

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Mr. E. S. Burdett, a witness for the plaintiff, after having been sworn to tell the truth, the whole truth, and nothing but the truth, on direct examination, testified as follows.

Direct examination.

By Mr. Webb:

Q. What is your name?
A. E. S. Burdett.
Q. Have you been sworn?
A. Yes, sir.
Q. What is your age?
A. 59.
Q. Where is your residence?
A. 417 S. Rusk, Sherman.
Q. What is your occupation?
A. I am working under the title of Assistant Superintendent.
Q. You are Assistant Superintendent of the Texas Electric Railway Company?
A. Yes.
Q. You live in Sherman?
A. Yes, sir.
Q. How long have you been connected with this railroad company?
A. Since 1920.
Q. 1920?
A. That is the second stretch. I worked for them prior to 1915, too.
Q. Are you acquainted with the kind of business your company is engaged in?
A. Yes, sir.
Q. Where does the line begin and end?
A. At Denison, and ends at Waco.
Q. Denison, Texas, and Waco, Texas?
A. Yes, sir.
Q. Does your line haul freight?
A. Yes, sir.
Q. Got freight cars to haul freight—special cars?
A. Special cars for express matters, yes, but we don't have any standard freight cars.

Q. Special cars for the hauling of freight?

A. Yes.

[fol. 130] Q. That's right, isn't it? And those cars, are you acquainted with what kind of freight is transported in those cars?

A. Yes.

Q. Interstate freight?

A. Yes, some Interstate.

Q. That happens daily?

A. Yes, sir.

Q. Every day——

A. No, I can't say every day. There is some days that we don't have freight. Generally speaking, yes.

Q. Generally speaking, yes?

A. That is Interstate.

Q. That has been the condition since you have been with the company?

A. No, that has been the condition since 1932.

Q. About 1932 you began working as a railroad and not as an interurban?

A. You are asking a question there that I can't answer definitely.

Q. All right. You are acquainted with those movements of cars, passenger cars from Sherman to Denison?

A. Yes.

Q. And were at the time of this collision, you were acquainted?

A. Yes, sir.

Q. I will ask you if it isn't a fact that just one time daily—one time in each day—when the northbound or southbound car meet at Woodlake?

A. No.

Q. How many times?

A. I will have to have a time card to tell you. It is frequently during the day.

Q. When Mr. Hunter was on there, he just had to meet the northbound car at that place once daily?

A. Well, there is what is known as turn-around cars, those trains in the 50s. Yes, sir, they meet one time only—the north bound.

Q. And on all the other trips—there is one trip out of the five he doesn't meet anybody there?

A. That is a fact, yes.

[fol. 131] Q. Isn't it a fact that the northbound car is at Woodlake, or in that area, waiting on the southbound car nine times out of ten?

A. No, sir, I don't think so. The schedule leaving time is the same. It depends on the travelling conditions between the two towns of Denison and Sherman.

Q. You know when they took that block signal away from there?

A. No, sir. I was not in anyway connected with that division when they had that block signal. I have only been with this division since 1932.

Q. Since you have been Assistant Superintendent, you have not taken the block signal?

A. No, sir.

Q. If you had been, you would never had taken it away?

Gullett: We object to that as calling for an opinion and conclusion.

Q. Mr. Hunter didn't have anything to do with it?

A. I don't know. It was before my time.

Q. He has not been an official of your company? Has he been an official as director and assistant superintendent?

A. I believe he testified he was a dispatcher.

Q. In the dispatcher's office?

A. Been a dispatcher.

Q. What executive power do they have?

A. Operating trains.

Q. Do they have executive power to put in or take out block signals?

A. No, sir.

Q. As a dispatcher, he didn't have anything to do with that?

A. Taking out and putting in is part of my connection with this division. In other words, I went to work for the railroad in 1920, but I worked between Dallas and Waco, and Dallas and Corsicana, and in Waco. I came from the city of Waco to here in July of 1932.

Q. You worked about 25 years and Mr. Hunter about 40?

A. Yes.

[fol. 132] Q. You know the time Hunter and Maxwell's cars collided—you remember that?

A. Yes, sir.
Q. Maxwell was not there?
A. I don't know.
Q. Back out somewheres——

Gullett: Wait a minute. Let Mr. Webb testify. Let him be sworn.

A. I don't know where Mr. Maxwell or Mr. Hunter was. I was south of Sherman when the thing happened.
Q. Do you know the duties of those two gentlemen? Take Mr. Hunter?
A. Yes, sir.
Q. With reference to the car, those motormen, what were they?
A. They were working as operators of the cars.
Q. In operating the car, did the motorman drive the car?
A. Yes, sir.
Q. And if anything went wrong with the trolleys, they would have to go out and work—it?
A. Yes, sir.
Q. Take money from the passengers, and pick up passengers, and let passengers out?
A. Yes, sir.
Q. And take these big sheets with them?
A. The time tables.
Q. They have it in evidence.
A. They carried them folded up and not spread like I carry this one.
Q. Do you have a slide rule with you to figure it?
A. No, sir, don't need one.
Q. Do you know whether a motorman carries a slide rule to figure that out?
A. No slide rule is required to figure it out.
Q. Do all of that, hour after hour, they would have to remember that at a certain hour to meet a certain car at a certain place?
A. It is clearly printed on the time card. He doesn't depend on his memory.
[fol. 133] Q. He doesn't know what he is going to do until he sees the time card?
A. If he doesn't know what he is going to do, he looks at the time card.

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Q. He is supposed to do that? Ride along with the time card?

A. Spearman, you understand what we are talking about. The man refers to his time card. Your remark about the slide rule does not fit with a time card. It is not necessary.

Q. At least he has to keep it on his mind?

A. The operation of his train? Yes, sir, above all things.

Q. He has to keep constantly at his work several hours, backwards and forwards, and making round trips?

A. Are you talking about that particular run?

Q. Any of them?

A. If you are going to specify that particular run, he had lay-over times when he wasn't working.

Q. Was that all his schedule that you say he carried around with him?

A. Yes, sir.

Q. I believe that is all.

Cross-examination.

By Mr. Gullett:

Q. Now, Mr. Burdett, you testified you came up in 1932 to this end of the division?

A. That's right.

Q. Between the time you came, from 1932 until May 2, 1944, had there been any block signals in operation between Woodlake and Denison?

A. No, sir.

Q. Over that approximately 12 years' period of time, the operators of those cars had carried on their business with the time card?

A. Yes, sir.

Q. Mr. Webb spoke to you about this time card. The meets in this time card that Bob Hunter had is plainly put here?

A. Yes, and all other trains.

[fol. 134] The rules require, and Hunter testified he had the time card in front of him. Is that the usual practice?

A. Yes, sir.

Q. It is a fact, is it not, that there was in effect at that time a rule of the company requiring Mr. Hunter to definitely ascertain that that car was there before he proceeded?

A. Yes, sir. He had a positive meet with a certain specified train.

Q. Was it or not his duty at that time to ascertain that it was Train 15, and then ascertain whether or not No. 15 had signals, before proceeding?

A. It certainly was.

Q. What was his duty if Train 15 was not in there?

A. To leave his car in the clear and go to the phone booth and call the dispatcher.

Q. And the dispatcher would give an order to proceed or to wait? Is that right?

A. That is right.

Q. Mr. Burdette, the operators of those cars—I think it was undisputed—How long have you been operating the cars in that manner?

A. Since, I think that started in 1932, the latter part of 1932.

Q. Latter part of 1932. There was no difference in the work done and in the operation of those cars in May 2, 1944, since there had been in 1932?

A. Yes, sir.

Q. For twelve years the operators did the same kind of work?

A. Approximately, yes, sir.

Q. Now, Mr. Burdette, you know where this accident happened out there north of Woodlake?

A. Yes, sir.

Q. Mr. Maxwell was supposed to proceed on to Woodlake?

A. Yes, sir.

Q. And Hunter was to wait at Woodlake?

[fol. 135] A. Maxwell had an order to meet with No. 58, the same as Hunter had an order to meet with No. 15 at Woodlake.

Redirect examination.

By Mr. Webb:

Q. Just a question or two. Mr. Burdette, you testified about the rule that required the northbound motorman like Mr. Hunter to ascertain that the other car was there before proceeding on?

A. Yes, sir.

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Q. Do you have a rule requiring motormen to stay with the cars in emergencies until they brought the car to a stop?

A. Why?

Q. In emergencies?

A. Yes, sir.

Q. You had that rule?

A. That is ordinary common sense.

Q. You didn't have a rule authorizing Maxwell to leave his car running wild in an emergency and jumping off and letting it go?

A. No, we didn't have a rule from protecting Hunter himself if he wanted to.

Q. Do you have a rule that in an emergency that the motorman stay with his car until he stopped, as long as he had passengers—in an emergency?

A. I don't know that is specifically in any rule book.

Q. Do you have a rule that requires the motorman, when in danger, to leave his car and leave his passengers, and let the car run wild?

A. No, sir.

Q. You don't know whether Maxwell did that or not?

A. No, sir, I don't.

Q. Do you know whether or not the fuse or breakers were out that day?

A. No.

Q. Didn't you know?

A. You asked me if I knew.

Q. Did you investigate to see about it?

[fol. 136] A. I don't know that they did or didn't. You hadn't—it is not a disputed point.

Q. Have you had anything to do with the operation of these cars?

A. Yes, sir.

Q. You know the effect of a car going 50 miles an hour and don't apply your air brakes, but do throw it in reverse, it will knock out the breaker?

A. It will lock the wheel.

Q. Knock out the breakers?

A. It might or it might not.

Q. If the breakers were knocked out, it would release it? That is true?

A. Yes, sir.

Q. A car going 50 miles an hour, thrown in reverse, will shiver and the momentum will carry it right out?

A. No.

Q. You mean it will turn turtle?

A. No, sir. I mean the wheels lock, and when the motor starts turning, the wheels lock again.

Q. Can they turn with the power off?

A. Yes, sir.

Q. Can the motor turn with the power off?

A. Yes, and with it on, and the wheels will lock.

Q. Whether the power is knocked out, or the breakers, they don't lock the wheels?

A. No. Momentarily it is locked.

Q. The momentum at 50 miles an hour will carry it wild?

A. No.

Q. What will stop it?

A. The motor will set up the reverse again. It pulls and stops again, it pulls and stops again.

Q. Like an automobile?

A. No, not like an automobile.

Q. Run an automobile 50 miles an hour and throw it in reverse, it will have the same effect?

A. Similar, yes.

Q. Fifty miles an hour, and grab it, and throw into reverse——

A. And if you don't take your automobile out of reverse, will it run down hill?

[fol. 137] Q. I never tried it.

A. Illustrating: when you part the car in gear, so it won't roll off, that piston is going to catch it.

Q. It just turns the motor?

A. Sir?

Q. If you don't have a current going down hill, it will turn the motor?

A. Yes, it will keep turning, if it is in forward motion. If it is in reverse, it won't.

Q. What is the proper procedure, when a collision is imminent, to stop your interurban? To apply the reverse or go 50 miles an hour? Apply the reverse or apply the air?

A. Either way will stop it. You get the quickest jolt from the reverse. It will ruin the motors. It will splice the machine.

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Q. Do you know whether Maxwell is going to be a witness here?

A. No, sir, I do not.

Recross examination.

By Mr. Gullett:

Q. Mr. Burdette, you say you didn't have a rule covering Maxwell's action out there if he did jump off the car, but you did have a rule to make Bob Hunter stop and not over-run a meeting point and murder all those people?

Woodrow: We object to that as inflammatory and prejudicial, and improper.

Q. You did have a rule to prohibit Bob Hunter to run that meeting point?

A. Or anybody else.

Q. And he over-ran that meeting point and got in the collision?

Woodrow: We object to the leading.

Gullett: Cross-examination.

Webb: It is his witness.

[fol. 138] Gullett: This is my witness? Just a minute, who put him on?

Woodrow: You are bound by the adverse witness——

Gullett: Certainly.

Court: Plaintiff called this witness.

Gullett: I have a right to examine him, and I hadn't heard about him being an adverse witness.

Court: Go ahead.

Gullett: Mr. Burdette, if Bob Hunter hadn't overlooked that meeting point, that would not have happened?

A. He wouldn't have been out there.

Q. I will ask you if it isn't a fact that if you are driving one of those motors down the track and that you reverse it, even if the power goes off, those motors build up a certain amount of electricity?

A. If they are in reverse.

Q. And that electricity they burn up themselves will cause those wheels to lock and stop? The wheels will stop when thrown into reverse?

A. Yes.

Q. The motor will then proceed a short distance——

Woodrow: Object to the leading question he is just starting to propound. I claim that this man is for the company. They let him stay here in the courtroom.

Gullett: I don't get it. I am not ashamed of him.

Woodrow: We are not ashamed of him. He is a neighbor of mine.

Court: Go ahead.

Gullett: What happened immediately after the wheels locked, assuming the car is reversed?

A. After the wheels lock the first time, they release and go rolling, and they build up and it locks again.

Q. And that procedure continues until it stops?

A. And that procedure continues until it stops.

[fol. 139] Q. In other words, if the power on the motor was reversed, it wouldn't stop like that and run like that?

Woodrow: We object to the leading and suggesting.

Court: Sustain the objection.

Gullett: Assuming, Mr. Burdette, that a man is driving a motor car, and assuming that the car was going at 50 miles an hour, and assuming that the car will stop and that the wheels will lock, under your testimony, how far, in your opinion, would that car move, before they locked again?

A. Ten or fifteen feet.

Q. Then what would happen?

A. Lock again.

Q. Would they release again?

A. Yes, sir.

Q. How far would they proceed before they would lock again?

A. Same distance. Ten or fifteen feet.

Q. That would continue until the car stopped? Is that correct, sir?

A. Yes, sir.

Re-direct examination.

By Mr. Woodrow:

Q. You are not talking about air brakes?

A. No, sir.

Q. When you put on air brakes, there is no releasing and going forward, and stopping? There is nothing like that?

A. No.

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Q. When you put on air brakes, it will lock definitely and stay that way?

A. Not immediately.

Q. But releasing and going forward, and releasing and going forward, that doesn't happen?

A. No, but when your car wheels slide——

Q. How many wheels on the car?

A. Eight.

Q. That locks eight wheels?

A. Yes, sir.

Q. That is all.

[fol. 140] A. I may say that it doesn't lock as immediately as the other.

Q. If you put the air brakes on gradually, you can stop it?

A. Yes, sir.

Q. That same rule applies to the stopping point. To stop the car you manipulate those brakes?

A. Yes.

Q. You have got to stay with your car and keep manipulating the brake?

A. No.

Q. What do you mean?

A. Apply the proper amount of air to use your braking power with your brake shoe, rather than the bottom of the wheel.

Q. You do that gradually?

A. No, sir. The man over there——

Q. You mean Mr. Hunter?

A. Mr. Hunter did apply air and make as fast a stop with one application of air.

Q. Take from your station here, and go 800 feet. Where would you stop? At the southeast corner of the square, and up Travis Street, where would it stop?

A. Depends on the speed.

Q. If the car was 800 feet from this corner of the square and up Travis, standing still where would it be?

A. It would be——

Q. Near the M & P Bank Building?

A. Yes, sir.

Q. You mean to tell the jury that if this Maxwell had applied the brakes, he couldn't stop from here, at the station here, to Travis——

A. I didn't make such a statement.
Q. You didn't mean to say that?
A. There wasn't such a question.
Q. You mean by the car being at Wall Street, at 50 miles an hour, he couldn't have stopped to save his own hide and abandon the car—that he could have stopped it?
A. Yes.

[fols. 141-142] Re-recross examination.

By Mr. Gullett:

Q. He inquires about 800 feet. That other car was coming toward Maxwell on this occasion?
A. Yes.
Q. I believe that is all.
Court: Stand aside. Bring in the next witness.
[fol. 143] (Jury Brought In)
Gullett: Gentlemen of the Jury, before the defendant opens the case, I have some additional pleadings to read to the jury.

[Title omitted]

DEFENDANT'S FIRST TRIAL AMENDMENT

To the Honorable Said Court:

Comes now the defendant, The Texas Electric Railway Company, and, with leave of the Court first had and obtained, files this, its First Trial Amendment, and for same, says:

Without waiving any of the rights under its First Amended Original Answer heretofore filed herein, but still insisting on same, and in addition thereto, this defendant now says:

That the injuries received by the plaintiff herein, on the occasion in question, if any, resulted solely from a risk he assumed incident to, in the furtherance of, and in connection with his employment with the Defendant, The Texas Electric Railway Company.

Alexander Gullett, Freeman, Wolfe & Keith, By Alexander Gullett, Attorneys for Defendant, The Texas Electric Railway Company.

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DEFENDANT'S SECOND TRIAL AMENDMENT

[fol. 144] [Title omitted]

To the Honorable Said Court:

Now comes the defendant, Texas Electric Railway Company, and with leave of the Court first had and obtained, files this his second trial amendment and for same says:

The defendant would further show to the Court that in addition to the acts of negligence on the part of the plaintiff heretofore set out in Defendant's First Amended Original Answer, as being the sole proximate cause of the collision, injuries and damages resulting to plaintiff, if any, in the alternative said acts of negligence proximately caused or proximately contributed to cause the injuries and damages sustained by plaintiff, if any, on the occasion in question.

Freeman, Wolfe & Keith, Alexander Gullett, Attorneys for the Defendant.

Woodrow: We want to put a denial in here. The plaintiff denies the allegation.

Court: All right.

MR. L. T. YOUNG, a witness for the defendant, after having been sworn to tell the truth, the whole truth, and nothing but the truth, on direct examination testified as follows:

Direct examination.

By Mr. Wolfe:

Q. State your name, please, sir?

A. L. T. Young.

[fol. 145] Q. Where do you live, Mr. Young?

A. I live in Sherman, at 1109 E. Richard.

Q. What is your occupation?

A. Inspector in Denison of the Texas Electric Railway Company.

Q. You mean car inspector for the defendant in this case?

A. Yes, sir.

Q. Car inspector for The Texas Electric Railway Company?

A. Yes, sir.

Q. How long have you been employed by the defendant?

A. About 33 years.

Q. Do you remember when you first started working for the company?

A. 1912.

Q. What was your connection with the company on May 2, 1944?

A. I was car inspector.

Q. Do you remember, Mr. Young, the occasion of the collision between two cars out north of Woodlake?

A. Yes, sir.

Q. Did you go out there?

A. Yes, sir.

Q. Do you recall about what time the collision occurred? What time of day or night?

A. It was in the day—in the afternoon.

Q. Do you recall about what time during the afternoon of that day?

A. It happened somewhere about 3:45. No—I think it was about 3:50, I guess.

Q. Did you get out there a short time after it happened?

A. Yes.

Q. Did any one go out there with you?

A. Yes, sir.

Q. Who, please, sir?

A. Mr. Armour Wooley and H. E. Andrews.

Q. Who is Mr. Wooley?

A. He is a car inspector, also.

Q. Who is Mr. Andrews?

A. He is an operator.

Q. Was Mr. Wooley a car inspector for the company at that time?

[fol. 146] A. Yes, sir.

Q. Did you see, after you got out there, where two cars collided?

A. Yes, sir.

Q. Was it a head-on collision?

A. Yes, sir.

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Q. Approximately, where was the collision? Where were the two cars?

A. It was on a curve, something like ½ or ¾ of a mile north of Woodlake.

Q. After you got there, did you see the plaintiff, R. P. Hunter, anywhere near the two cars?

A. Yes, sir, I did.

Q. Do you remember about where he was?

A. He was at the rear end of the car that he was running.

Q. Do you know which car he was operating, whether it was the northbound or southbound car?

A. He was operating the northbound car.

Q. Did you have a conversation with R. P. Hunter at that time?

A. Yes, sir, I did.

Q. Will you tell the jury the conversation you had with him?

A. I asked him if he was hurt, and he said he was. And then I asked him to let's go to the doctor and he wouldn't do it. We talked, and he said he hated to end his career this way, it was all his fault.

Q. Mr. Young, did you, after that, search out there for any property?

A. Yes, sir.

Q. For what?

A. A watch.

Q. Whose watch?

A. Mr. Maxwell's.

Q. Did you find his watch out there?

A. I did, yes, sir.

Q. Where, with reference to where the two cars hit head-on, where did you find Maxwell's watch?

A. It was something like about a car length north of the car—the north end—the back rear end of the car.

[fol. 147] Q. How far, in feet, would you say that was from the point where the two cars hit head-on?

A. Well, I would say it was something near 100 feet or about 100 feet.

Q. State to the jury the condition of the ground and premises where you found the watch?

A. The weeds were mashed down. There was just a little streak down the weeds and grass.
Q. I believe that is all.

Cross examination.

By Mr. Webb:

Q. Mr. Young, you say your name is Young?
A. Yes, sir.
Q. Who did you say went out there with you in that inspection?
A. Mr. Wooley and Mr. Andrews.
Q. What Andrews?
A. Heinie Andrews, we call him.
Q. Where did Wooley and Andrews and you leave from to go there?
A. They called us at the station, and we went to Andrew's car and went to the yards, and got a freight motor.
Q. In Denison?
A. Yes, sir.
Q. And came out there on a freight motor, and came north?
A. Yes, sir.
Q. And got there about 45 minutes after the accident happened?
A. Something like that.
Q. What did you do?
A. I looked for Bob and asked if he was hurt.
Q. Just a minute—you are talking about Bob Hunter?
A. Yes.
Q. You were stopped behind the north car?
A. Yes, sir.
Q. And Bob, or Mr. Hunter, was in the south car?
A. Yes, sir.
Q. Had you seen Maxwell at that time?
A. No, sir.
Q. Did you see any crippled people around the north car at that time?
A. No, sir, I didn't. No, sir.
[fol. 148] Q. Why did you go hunting Hunter?
A. I had him on my mind and he was one of my best friends.
Q. Was Maxwell a good friend of yours?

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A. Yes, sir.
Q. You never thought about Maxwell?
A. Maxwell wasn't there and I saw Bob.
Q. Was there any dead people there?
A. No, sir.
Q. Was there any crippled people—you didn't see?
A. Not at that time.
Q. You passed them and got to Bob Hunter?
A. Yes, sir.
Q. Was Andrews with you all that time?
A. No.
Q. Was Wooley?
A. No. Wooley found Bob before I did.
Q. Was Wooley with Bob when you found him?
A. Yes.
Q. Was the other fellow with Bob when you found him?
A. No.
Q. When you caught up with Bob, that conversation was had in yours and Wooley's presence, and no one else?
A. No one else was around.
Q. Andrews wasn't around?
A. No, sir.
Q. Which side of the car did you come—on the east side or west side—on that curve, would you call it right going northeast?
A. Yes, sir.
Q. Which side of the track?
A. I was in the back of his car.
Q. On the west?
A. On the south side of his car.
Q. Inside?
A. No, on the outside.
Q. Back of the car?
A. Yes, sir.
Q. In between the rails?
A. No, leaning against the back end of the car.
Q. Was any of his passengers around there?
A. No, I never noticed any.
Q. Did the ambulance come out there?
A. The ambulances came up about ¾ of a mile from the place.
[fol. 149] Q. They never come to where the collision was?

A. No, sir, they couldn't get there. It was south near to Woodlake.

Q. The ambulances stopped at the crossing, and came up with the stretchers, and carried the people?

A. Yes.

Q. Did you see any people?

A. I helped take one.

Q. One of Bob's passengers?

A. No, sir. I wouldn't be positive. I don't know.

Q. You asked Bob if he was hurt?

A. Yes, sir.

Q. What did he say?

A. He said he was.

Q. Did you observe his appearance?

A. I beg your pardon?

Q. How did he appear? Did he look like he was in pain?

A. Yes, sir, it looked like he was in pain.

Q. Did he tell you why he didn't leave for the hospital?

A. He said to go ahead and take the others, and wouldn't go.

Q. He said to take every passenger and go ahead?

A. No, he didn't talk to me.

Q. He didn't go until the passengers——

A. He said to go ahead and take the rest of them.

Q. Were you there when he did go?

A. Yes, sir.

Q. Had all his passengers been taken care of before he left?

A. Yes, sir, they had.

Q. Every one of them?

A. Yes, sir.

Q. Did you start working for the company?

A. Yes, sir.

Q. You are their employee now?

A. Yes, sir.

Q. Was their inspector then?

A. Yes, sir.

Q. Mr. Young, isn't it possible that you heard somebody else say it was Bob's fault?

A. No, sir.

Q. What did he say?

A. He said he hated to end his career that way, and that it was all his fault.

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Q. Bob is talking?

A. Yes, sir.

[fol. 150] Q. Said he hated to end his career that way?

A. Yes, sir.

Q. That wasn't his language?

A. That is what I told you.

Q. What was it he said, in his own words?

A. He said he hated to end his career that way.

Q. Bob said "He hated to end his career that way?"

A. Yes.

Q. Who was he talking about when he said, "He hated to end his career that way."

A. Talking about himself.

Q. If he was talking about himself, he would say, "I hated——"

A. I said——

Q. Please tell his language.

—. All right. He said he hated to end his career that way. That is the words he spoke.

Q. You tell the Court and Jury that he said "He hated to end his career that way." You heard Bob say that?

A. He hated to end his career that way.

Q. If he said "He hated to end his career that way", how come you thought he was talking about himself? Did you ask him who he was talking about when he said, "He hated to end his career that way"?

A. No.

Q. You still say that that is his words. I'm not trying to be smart. That is his words: "He hated to end his career in that way."

A. That's right.

Q. What else did he say?

A. I don't remember right now anything else that he said.

Q. Just walked up and blurted out to you he hated to end his career in that way, is that right?

A. No.

Q. How long did you stay?

A. Just a half minute. There was too much to do to stay long.

Q. Did anybody talk to you frequently about this case and said it was too bad Bob had to end his career—or did that actually happen out there?

A. That actually happened.

[fol. 151] Q. You say now it was about 100 feet away. Did you call on Bob at the hospital after the injuries?

A. Yes, sir.

Q. Talked about this collision two or three times?

A. No, we didn't. He tried to two or three times, and I tried to change the subject.

Q. How did he try it?

A. I don't know. He would bring it out in different ways—say two or three different things.

Q. What did he say?

A. I couldn't tell you.

Q. You say the only time he ever said, "He hated to end his career this way", or anything about this happening to you, was out there when you first got to him?

A. That's right.

Q. Don't you know that conversation didn't happen? Have you told everything—and leave out "He said he hated to end his career this way—outside of that, the only thing you and Bob said out there on the ground, was you asked whether he was hurt and he said he was, and you asked to take him to the hospital, and he said, "Wait until the rest of them go and I will go later." Is that all?

A. No.

Q. What else?

A. I told about him hating to end his career.

Q. What else?

A. I helped put him in the express car, and I asked him if he was hurt and he said he was, and that his legs was hurt.

Q. You asked that when you first went up?

A. Yes, and——

Q. You again asked?

A. I asked how he was feeling and he said his legs was hurt.

Q. Did he say which leg?

A. I don't believe he did.

Q. Is that all that was said?

A. That is all I remember.

Q. First question: "Are you hurt? He said, "Yes, sir." And the next thing, he voluntarily blurted that he hated to

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[fol. 152] end his career this way, and then you went about your business, and came back and asked how he was feeling and he said his legs were hurt, and that is all that was said?

A. That is all I remember that was said.

Q. Did you ask him how it happened?

A. No.

Q. How soon after this accident happened did you make a written statement to the company, to Mr. Sieberg?

A. I don't remember the day. You were present at the time.

Q. I am not talking about the deposition.

A. That is all I ever made.

Q. That is the only statement?

A. Yes, sir.

Q. You never talked to the Claim Agent about it at all?

A. I don't know. I don't remember talking to him about it at all.

Q. In other words, your deposition was taken a few months after the collision occurred, was it not, in court?

A. I don't remember the date, or how long it was.

Q. I will get the date in a minute—on the 27th of October, 1944—That would be June, July, August and September—that would be 5½ months after the collision—that period of time and you hadn't talked to the Claim Agent?

A. Oh, yes, I expect I had.

Q. D*id* you know any one time?

A. I don't know any one time. He asked us if we got any names of the people.

Q. Was he out there?

A. Shortly after that.

Q. Was he on the ground when they got Bob to the hospital?

A. No, sir, I don't believe—I saw him at Woodlake.

Q. He was asking about names? Did you give him the names?

A. I didn't get any.

Q. He asked you about who you saw?

[fol. 153] A. No, that is about the length of our conversation.

Q. When was the next time you talked? You talked to him before you went to see Bob in the hospital?

A. No, sir, I don't believe—I don't remember when I did see him.

Q. Now, were these two cars, the front of both of them pretty well crushed in?

A. Yes, sir.

Q. Were the brakes all knocked out from the collision?

A. Yes, they were.

Q. Could you tell much about it?

A. No, sir.

Q. You couldn't tell from the physical facts which was going the fastest and which was going the slowest?

A. I couldn't tell.

Q. The cars were virtually crushed?

A. The front ends.

Q. You say you found the watch 100 feet—did you measure it?

A. No, sir, I did not.

Q. On which side of the track was it?

A. On the west side.

Q. You said about 100 feet north of the north end.

A. It was about a car length from the back end of the north end.

Q. What were you looking for that watch for?

A. He told some other parties he lost his watch.

Q. Who told some other parties?

A. Mr. Maxwell.

Q. When did you get that information?

A. It was after we got the people out there and before we cleared the wreckage.

Q. After the people were gone, you employees began clearing the wreckage?

A. Yes, sir.

Q. Did you see Mr. Sieberg out there?

A. I didn't see him at the wreckage.

Q. Were you asked by anybody to figure from the physical evidence about the distances?

A. No, sir.

[fol. 154] Q. Where did you get the impression that it was just 100 feet?

A. We looked back at the car that Maxwell jumped out—we had a little comment about it—and we looked for the watch and went on the west side, and I saw where the weeds

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were mashed down. I saw part of the chain and the rest was covered up.

Q. I will ask you if you didn't state to Mr. Hunter, in Mrs. Hunter's presence, after he was at the hospital, after the wreck, that that man jumped at least 150 feet or more?

A. I don't remember making such a statement.

Q. Is it now your intention to leave the impression that Maxwell jumped where his watch was—a hundred feet from the collision? Is that it?

A. Yes, sir. I would say it was about a car length back of the north car.

Q. Isn't it a fact that it was about 500 feet that he jumped, before those two cars collided?

A. No, sir.

Q. Do you know which direction Maxwell ran after he hopped off the train?

A. No, sir, I do not.

Q. Whether he ran south or ran north?

A. No, sir.

Q. Now then, do you know whether the breaker was knocked out there at the substation from Woodlake to Denison?

A. No, sir.

Q. Did you make an investigation.

A. No, sir.

Q. Why didn't you?

A. It wasn't my place.

Q. Weren't you inspector?

A. Not juice inspector.

Q. What kind of inspector are you?

A. Car inspector.

Q. Were you present at any investigation that showed that the breaker was knocked out?

A. No, sir.

Q. Can you tell from inspection of Maxwell's car as to whether or not he threw it in reverse?

A. No, sir.

[fol. 155] Q. Why?

A. I didn't inspect it.

Q. Why didn't you?

A. I didn't think it was necessary. We had to clear the wreckage up.

Q. Did you inspect the brakes to see whether or not they were thrown off?

A. No, sir.

Q. You were car inspector to inspect the cars, and you didn't inspect?

A. That wasn't the proper place or time.

Q. Did you inspect it afterwards?

A. No, sir, it was carried to Monroe in Dallas.

Q. How was it carried?

A. Pulled.

Q. Do you know whether it was inspected in Dallas?

A. No, I don't know.

Q. If it was inspected, can you tell whether the brakes had been put on?

A. No, I doubt it.

Q. Could any one tell whether either car was thrown in reverse, in the inspection?

A. Not until you moved the car.

Q. Did the mechanism indicate whether it was thrown in reverse?

A. All that mechanism in front was torn up.

Q. That is all.

Redirect examination.

By Mr. Wolfe:

Q. Do you know where Mr. Wooley is now?

A. Yes, sir.

Q. Where is he?

A. Home sick in bed.

Q. That is all, thank you.

Recross examination.

By Mr. Webb:

Q. Just one other question. On this reverse proposition, is there any part on the bottom of the car that you could tell?

A. Yes, if any one would look at it.

Q. Was it knocked loose?

A. Yes—part of it was.

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[fol. 156] (Witness leaves witness stand)

Wolfe: I want to introduce part of Mr. Wooley's deposition.

ARMOUR WOOLEY, a witness for the defendant, from a deposition taken on October 27, 1944.

Wolfe: Reading from the deposition of Mr. Armour Wooley on page 23, line 6:

Q. Did you see Mr. Hunter on that date?

A. Yes, I did.

Wolfe: Reading from the same page 23, question 26:

Q. Did he say anything to Mr. Young in your presence?

A. Yes.

Q. What did he say to Mr. Young?

A. He told Mr. Young that it was all his fault and that he hated to end his career that way.

Cross examination.

Webb: Just a minute, in that connection, give us a moment to check to see if we want to offer some more of this deposition. We will offer Lines 7 through 16, on page 20.

Q. Please state your name?

A. Armour Wooley.

Q. What is your age?

A. 41.

Q. Where do you live?

A. Denison, Texas.

Q. How long have you lived in Denison?

A. I went over there the 2nd of February, 1943, I believe.

Q. What is your address in Denison?

A. 501 West Hunt Street now.

Webb: Now Line 19 until I quit reading.

Q. Can we get you by phone by phoning your place where you are working in Denison?

A. Yes.

Q. Where is that, what is it called?

A. 598 is the telephone number at the Interurban station.

[fol. 157] Q. What is your occupation?

A. Bus mechanic and assistant car inspector.

Q. The Texas Electric runs buses in the city and interurbans from Denison to Dallas?

A. Yes.

Q. How long have you been employed in that work by Texas Electric?

A. I went to work there about two years and three months ago.

Q. You were employed at that in May, 1944, when there was a collision north of Woodlake between two interurbans, one headed north and one south?

A. Yes.

Q. Were you present on the scene of the accident at the time of the collision?

A. No.

Q. Were you there after the collision?

A. Yes.

Q. Do you remember about how long after the collision?

A. Not exactly, no, as to how long it was; it was forty minutes, I guess, maybe longer than that.

Q. Was anybody with you or not?

A. Yes.

Q. Who?

A. Mr. L. T. Young and Mr. Andrews.

Q. What Andrews?

A. H. P. Andrews.

Q. Was he working at the time for Texas Electric?

A. Yes.

Q. In what capacity?

A. Motorman.

Q. Where does he live?

A. Here in Sherman; I don't know his address.

Q. Did you inspect the rails to see whether or not either one of the cars applied brakes before the collision?

A. No.

Q. If they had, the rails would not have shown anything, would they?

A. I wouldn't say about that.

Webb: Now page 23, beginning with Line 6:

Q. Did you see Mr. Hunter on that date?

A. Yes, I did.

[fol. 158] Q. Where was he?

A. Out there where the wreck occurred.

Q. Where was he, on the ground or in the car?

BLEED THROUGH– POOR COPY

A. In the car when I first saw him.
Q. In the back end?
A. I don't remember what part of the car.
Q. Did you talk to him?
A. Yes.
Q. Was anybody present when you talked to him?
A. Mr. Young.
Q. Andrews wasn't present?
A. No.
Q. What did he say to you and you to him?
A. I asked him if he was hurt and he said yes that his leg was hurt and hurt through his chest.
Q. What else did you say to him?
A. That was all I said.

Webb: Now Line 1, page 24.

Q. Did he appear to be suffering at that time?
A. Not a great deal.
Q. Did he appear to be suffering in any degree?
A. Yes, some.
Q. But not much?
A. No, he didn't.
Q. Did you talk to him after you talked to him in the car?
A. No.
Q. That is the only conversation you have had with him, at that time on that scene?
A. No.
Q. Were you present at any other conversation between him and Young?
A. No.
Q. Did you go to see him in the hospital?
A. Yes.
Q. About how many times?
A. Just once.
Q. Do you remember about how long after the collision it was?
A. About eight or ten days.
Q. Was anybody with you?
A. No.
Q. Was anybody in the room with you?
A. Mrs. Hunter was there.
Q. Anybody else?
A. Not that I remember of.

Q. You didn't talk about the accident at that time?
A. No.
[fol. 159] Q. Just talked about how he felt?
A. That is right.
Q. Did he ever make any statement to you about how it occurred except one time you say he said, "It was all my fault; I hate to end my career this way"?
A. I've never heard anything about it since.
Q. Have you talked with Maxwell at all?
A. No.
Q. You have never heard his side of the story?
A. No.
Q. Did you check up to see how far north of the impact it was where Maxwell jumped from the southbound car?
A. No, I didn't check it.
Q. Did you see it checked?
A. No.

Webb: And Judge Freeman, on his cross-examination.

Q. Do you expect to continue your residence where you now live?
A. Yes.
Q. So far as you know now, you will be able to appear in person and testify as a witness in this case, if tried?
A. Yes.

Webb: I believe that is all.
Court: Bring in your next witness.

T. N. Maxwell, read from his deposition, taken on November 14, 1944.

Gullett: This is a deposition of T. N. Maxwell, the motorman on the southbound car. This is the direct examination by Spearman Webb.

Q. Please state your name?
A. T. N. Maxwell.
Q. Your age?
A. 50 years.
Q. Where do you reside?
A. 2419 Denley Drive, Dallas, Texas.
Q. By whom have you been employed?

BLEED THROUGH– POOR COPY

A. Texas Electric Railway. There is two or three companies there. Would that make any difference?

[fol. 160] Q. The Texas Traction Company is one?

A. That was the first one. The Texas Electric Railway was the next one. Texas Electric Railway Company was the last one.

Q. How long have you been employed by those three companies?

A. 28 years.

Q. What was your employment in the summer of 1944?

A. Train operator.

Q. You were what you call a conductor?

A. We call them operators.

Q. Operators?

A. That is the way my mail is addressed to me.

Q. In other words, you would run the car?

A. Yes, sir.

Q. Now there was a collision along about May 2nd, 1944, between two cars on the same track belonging to this company?

A. Yes sir.

Q. And where was that collision?

A. Well I don't have the exact inches and feet but I imagine it was about three-quarters of a mile north of Woodlake, between a half and three-quarters.

Q. You were operating one car?

A. Yes sir.

Q. And the plaintiff in this lawsuit, Mr. Hunter, was operating the other car?

A. Yes.

Q. Is that right?

A. That is right.

Q. You were operating the southbound car and he was operating the northbound car?

A. Yes sir.

Q. Now then he was supposed to stop and wait for you at that hour on a siding, was he not?

A. Yes.

Q. You had those printed schedules?

A. Time cards.

Q. And at that hour every day the northbound operator was supposed to pull out on the siding and wait for the southbound, isn't that right?

A. Well, no. The northbound train was on the main [fol. 161] line and the southbound train was supposed to take the siding. But they were supposed to meet at the same time.

Q. You mean that the car you were driving was supposed to take the siding?

A. Yes.

Q. Did you take the siding at that time?

A. No.

Q. Why?

A. Well he came on down past the siding and met me.

Q. You never got to the siding, then, it that right?

A. That is right.

Q. Mr. Hunter drove his car past the siding and you all collided before you ever got to the siding?

A. That is right.

Q. If you had got to the siding you would have pulled out on the siding and waited, is that right?

A. That is right.

Q. Now did that happen every day?

A. Well what happened that day just happened once.

Q. I don't mean the collision.

A. Yes.

Q. I mean, pulled out on the siding every day at that hour?

A. Yes, sir.

Q. Now then do you remember what rate of speed you were going when that collision occurred?

A. No, we didn't have any speedometer on the cars.

Q. Well from your best judgment, please sir?

A. Well there is no way of telling that. There is a way of approximating it, but if you were in an airplane going 300 miles an hour and me down on the ground, you couldn't tell how fast I was going.

Q. Were you going approximately slow or approximately fast?

A. I was running fast.

Q. You were behind schedule time?

A. No.

[fol. 162] Q. You didn't leave Denison behind time?

A. No.

Q. Now then had you passed a curve before the collision or was the collision on a curve?

BLEED THROUGH– POOR COPY

A. It was right on a curve, I believe. I haven't been back up there since it happened.

Q. You haven't been able to do much of anything since it happened? Well we have an agreement to leave out about the injuries. Now then how far in front of you was his car when you first saw it?

A. Well I don't have the feet and inches there but—

Q. Well I mean approximately?

A. About 500 feet, 400 feet, something like that.

Q. You saw it about four or five hundred feet before you reached it?

A. Yes, just coming around the curve.

Q. And what did you do? Jump?

A. Yes, I jumped.

Q. You did not apply the brakes?

A. Yes.

Q. You did apply the brakes?

A. I did.

Q. What else did you do?

A. That is all I had time to do: Apply the brakes, open the door and jump.

Q. Apply the brakes, open the door and jump? Now what kind of brakes did it have on it?

A. Air brakes.

Q. And that was four or five hundred feet from this fellow?

A. Yes.

Q. You don't think it was any less than that or any more than that?

A. No, no. I wouldn't say that it was. I don't know the exact inches and feet.

Q. If you hadn't jumped you would have been killed, wouldn't you, or else hurt bad? In other words, you had to jump? You thought you did, at least, didn't you?

A. Well I don't know whether that is permissible or not. I thought I did the thing that I thought was best for me.

[fol. 163] Q. You thought it was best, under the circumstances?

A. Yes.

(Court Reporter's Note: The next question, on Line 4 of page 8, "Q. Of course you did. You wouldn't have jumped if you hadn't." This was stricken upon objection

of plaintiff's counsel, Mr. Webb, to which the defendant then and there excepted.)

Q. Now did you talk to Mr. Hunter after the thing occurred?

A. No, not then.

Q. Did you talk afterwards?

A. Yes, I have talked to him.

Q. Did he make any statement to you?

A. No.

Q. Or say anything about how it happened?

A. No, not pertaining to that.

Q. You just talked to him about his condition, did you not?

A. Well just general. We had a general conversation.

Q. You knew when you jumped, at least you thought when you jumped that the collision was not only imminent but the collision was certain?

A. Certainly.

Q. Yes?

A. Yes, I knew it was certain.

Q. You knew it was certain. Do you remember whether or not his car slowed down any at all?

A. No sir I don't.

Q. You don't remember that?

A. No.

Cross examination.

Q. Now Mr. Maxwell, you say you have worked for the company under its various names for about 28 years.

A. Yes.

Q. In what capacity have you worked?

A. Well when I first went to work I worked on the city lines in Sherman. They called me a motorman then.

Q. Motorman on the electrically driven street cars?

A. Yes.

Q. What was your next work with the company?

A. You go off of the streetcars onto the interurban.

[fol. 164] Q. You were operator on the interurban?

A. I was motorman on the interurban and conductor on the interurban.

BLEED THROUGH- POOR COPY

Q. That was in the days when they had a motorman and a conductor, two man cars?

A. Yes.

Q. And your work there, as I understand it, has been operating on a streetcar line and on the interurban line and also as conductor on the interurban line?

A. Yes. And dispatcher.

Q. And dispatcher?

A. Yes.

Q. And you of course know what this time card means?

A. Very well.

Q. And represents to the operator?

A. Very well. It means all of it. That is the whole thing of the schedule.

Q. Now you left Denison at what hour on May 2nd just prior to that collision?

A. 2:30.

Q. 2:30 P.M.?

A. Yes, sir.

Q. And you had a time card with you there in the car, did you not?

A. Yes, sir.

Q. Where did you keep your time card?

A. Hanging on a clip in front of me.

Q. And you knew from that time card and you knew that the time card did show that you were to leave Denison at 2:30?

A. Yes sir.

Q. And what time did it show that you were to pass that northbound car at Woodlake?

A. 2:47.

Q. Now was that time and schedule shown on that time card?

A. Yes, sir.

Q. Was it shown on the time card you had on that day?

A. Yes, sir.

Q. Now what was the requirement as to what you were [fol. 165] supposed to do when you got to Woodlake and what Mr. Hunter was to do when he got to Woodlake?

A. Which question do you want answered first?

Q. I will ask what Mr. Hunter was to do when he arrived at Woodlake?

A. He was supposed to stop. And if I wasn't there he would get off and call the dispatcher if I wasn't in sight.

Q. He was on the main line?

A. Yes sir.

Q. And if he arrived there first, was he to wait until you arrived? A. Yes, sir.

Q. And if you arrived at Woodlake first you were to wait until he came?

A. That is right. Wait a minute before you go any further: We were supposed to wait there unless we were moved by the dispatcher.

Q. Unless you were otherwise directed by the dispatcher?

A. By a train order.

Q. By a train order? Otherwise you must wait at that siding there at Woodlake?

A. Yes sir.

Q. And unless you had received orders through the dispatcher, you were to wait there?

A. Yes sir.

Q. And under those circumstances would you move your car beyond the siding unless you had received orders from the dispatcher?

A. No sir.

Q. Now on May 2nd, that was the date, wasn't it, May 2nd, 1944?

A. Yes sir.

Q. And I believe you testified that the point of collision was approximately three-quarters of a mile north of Woodlake?

A. Yes, sir. A half to three-quarters.

Q. Approximately three-quarters of a mile, that is correct, isn't it?

A. Yes sir.

[fol. 166] Q. In other words, the point of collision was approximately three-quarters of a mile north of where Mr. Hunter should have waited for you?

A. Yes, sir.

Q. And he did not wait, did he?

A. No, sir.

Q. Had you received any orders from the dispatcher or from any other source that you were not to meet Mr. Hunter at the Woodlake crossing?

A. No, sir.

BLEED THROUGH— POOR COPY

Q. What was the number of your train?
A. 15.
Q. No. 15?
A. Yes sir.
Q. And what was the number of Mr. Hunter's train?
A. 58.
Q. And those numbers are shown on that time card, are they not?
A. Yes sir.
Q. On that date, that is, the date of the collision, after you had left Denison and were coming south towards Sherman, had you expected to meet Mr. Hunter there at the Woodlake crossing?
A. Yes sir. You better put that "siding" there every time.
Q. "Siding", yes. When I say "crossing" I mean "siding."

Mr. Webb: "Siding" wherever he says "crossing".

Q. Now there at Woodlake, Mr. Maxwell, there is a siding there and it is on the west side of the main line?
A. If the track runs north and south, yes sir.
Q. We will consider it does run approximately north and south?
A. Yes, sir.
Q. Then the siding would be on the west side of the main line?
A. Yes sir.
Q. Isn't there a building or two there at Woodlake owned and used by the Texas Electric Railway Company?
A. Yes, there is a telephone booth there.
Q. Isn't there a larger building there?
[fol. 167] A. A section house, what we call them, there, and a sub-station.
Q. Do you know what color they are painted?
A. Sir?
Q. What color were they painted on May 2nd, 1944?
A. Our telephone booth and our section house was painted yellow. That is our standard color.
Q. Now were those two buildings on which side of the main line?
A. On the west side.
Q. On the west side? And where are they located with reference to where the siding begins, side track begins?

A. On the north end.
Q. On the north end of the siding?
A. Yes.
Q. That would be on the end nearest to Denison?
A. Yes sir.
Q. Are those buildings there visible as you are approaching Woodlake from the south and going north?
A. Yes sir.
Q. They are visible to the operator of the car?
A. When he gets to the siding, yes.
Q. Well isn't there a lake over there on the east side of the main line?
A. Yes sir.
Q. That is visible there for the two motormen too, is it not?
A. Yes sir.

Mr. Webb: In other words, a fellow couldn't pass there without knowing exactly where he was.

Q. Well is there any sort of wire or anything across the track there at Woodlake?
A. Span wire.
Q. Span wire overhead?
A. Yes, that holds up the trolley.
Q. Are there any sort of signs to indicate the Woodlake stop?
A. Yes, there is a sign on each side of the telephone booth painted "Woodlake".
Q. With the word "Woodlake" on it?
A. Woodlake, yes sir.
Q. If I understand it, the tracks there at Woodlake where [fol. 168] the siding is on the east is the main line?
A. Yes sir.
Q. And then immediately west is the siding?
A. Passing track, yes sir; siding.
Q. Side track? And then west of that are located the two buildings you were talking about?
A. Yes.
Q. Do you know, Mr. Maxwell, how long that siding is there at Woodlake?
A. No I don't know exactly how long it is. Something like four or five hundred feet, I imagine; four hundred feet.

BLEED THROUGH- POOR COPY

Q. About how many interurban or passenger cars do you think it will accommodate?

A. Well six or seven, I imagine. I expect it will clear seven cars, you know, just coupled up together. It might be more than that and it might not be that much. I never had occasion to measure it or anything like that, but I believe it will hold seven, six or seven.

Q. Do you know about how long those time cards have been in use there by the company and used by the operators of the cars?

A. No I don't. It is printed on every one of them when they go into effect.

Q. Had they been in effect for some few years prior to May 2nd, 1944?

A. It had been in effect some time before that but I just don't remember exactly how long.

Q. It had been over a period of years, had they not?

A. Well we changed time cards frequently.

Q. I mean you had been using the time cards for a number of years?

A. Oh yes, we always used the time cards.

Q. And the schedule shown on the time card you were using on May 2nd, 1944, it had been in use for some time prior to May 2nd, 1944, had it not?

A. Yes sir.

[fol. 169] Q. In other words, the schedule had not been changed for some time?

A. No sir.

Q. Now, Mr. Maxwell, when you left Denison at 2:30 on the afternoon of May 2nd, 1944, where were you going, what was your destination?

A. Dallas.

Q. Dallas. Do you know where Mr. Hunter had boarded the car he was driving on that occasion?

A. Well, where he boarded?

Q. Wasn't that what they call the "plug car"?

A. Yes, sir, that is what everybody calls it. Commonly called "Plug car".

Q. Between Denison and Sherman and Sherman and Denison?

A. Yes, sir.

Q. In other words, there was a car between Denison and Sherman at that time practically every hour?

A. Well I think the schedule worked out at that, but they didn't leave Sherman every hour. That is, just going to Sherman and back.

Q. Do you know about how long Mr. Hunter operated that car that you were to meet there at Woodlake at 2:47?

A. You mean how long a period?

Q. Yes sir?

A. In years?

Q. Yes sir?

A. Do you mean more than that one trip?

Q. I understand he would make more than one trip, but he had operated that particular car in the afternoon, hadn't he, for some time?

A. Yes sir.

Q. Do you know about how long he had been operating it?

A. No. Since the change in the last time card, and I don't have it with me.

Q. I don't mean to restrict it down to that particular car [fol. 170] but I mean a car running on that schedule. Had he been operating on that schedule there for some time prior to May 2nd of this year?

A. Yes sir.

Q. Do you know about how long he had been?

A. Well I just don't know how long that time card had been in effect. It was a good long time, though.

Q. Would you say over a period of some months?

A. Yes sir.

Q. As much as a year?

A. No I don't believe it had been. It seemed like—well I just don't know. It was over some months, though.

Q. He had been operating as long as that time card had been operating?

A. Yes sir.

Q. Do you recall the weather on that occasion?

A. Well I believe it was clear.

Q. You believe it was clear? That is your best recollection?

A. Yes sir.

BLEED THROUGH- POOR COPY

Q. Now I don't know whether I asked you or not: What is your best recollection as to the time the collision occurred?

A. Well I couldn't say for sure because I didn't have my watch in my hand, but I believe it was around 2:45.

Q. Around 2:45 in the afternoon?

A. Yes sir.

Q. And there is no question in your mind but what the date was May 2nd, 1944?

A. Oh no, I will always remember that date very well.

Q. Now were you operating your car on that occasion at the usual and customary rate of speed at that point?

A. Yes sir.

Q. And I believe you stated in answer to Mr. Webb's question that you were running on schedule?

A. Yes sir.

[fol. 171] Q. And you were not endeavoring, I presume, to make up any time?

A. No sir.

Q. And if I recall your testimony you said you saw Mr. Hunter's car somewhere around between four and five hundred feet?

A. That is just a guess. That is my estimate.

Mr. Webb: Pardon me. We want your approximation, please sir, and not your guess, if we can get it.

Q. (By Mr. Wolfe) Well it is your estimate that it was approximately four to five hundred feet?

A. Four to five hundred feet, yes.

Q. Is that your best judgment?

A. Yes sir.

Q. Then I understood you to say that you immediately applied the brakes and that the brakes on that car were air brakes?

A. Yes sir.

Q. And then after applying the brakes that you then next opened the door and you jumped from the car?

A. Yes sir.

Q. On what side of the car was the door, Mr. Maxwell?

A. It was on the righthand side.

Q. And you then jumped in what direction?

A. Well if the track runs north and south, I jumped west.

Q. You jumped west. Well don't you folks that work for the company consider that line there between Denison and Sherman runs generally in a north and south direction?

A. I always did, sir.

Q. Mr. Maxwell, would you give us your best judgment or tell us what you think your rate of speed was, to the best of your judgment, at the time you saw the Hunter car?

A. Well it was running just as fast as it would run. That is about our schedule between Sherman and Denison. 35 [fol. 172] or 45 miles an hour is what they would make. We have no speedometer on them and it is all guess work.

Q. You have operated cars there between Denison and Sherman quite a long time, haven't you?

A. Yes sir I have.

Q. And you know the mileage from Denison to Sherman?

A. Ten miles, yes sir.

Q. And based on that experience you have had and knowing the mileage and knowing your schedule and the time that it takes you to operate between Denison and Sherman, could you give us an estimate? You understand that we are not asking that you be exactly accurate and correct on the rate of speed, but just what is your best judgment?

A. Well let me talk to you just a minute off the record.

(Discussion off the record)

Q. In other words, you had to make a stop every time you saw a passenger?

A. I had to let them off when they wanted off between Sherman and Denison and I had to pick up the passengers at the other stops or at the same stops that wanted to get on between Sherman and Denison, or Dallas. And that is where we use running time. If we could just get up and didn't stop anywhere, there would be lots of difference in that. Where you are doing local work and making street stops, it makes a lot of difference in the speed of your car. You have to do your running out in the open to make your time.

Q. Do you know how far it was from where you jumped to the point of collision?

A. No, not exactly.

Q. I believe you testified that you were driving as fast as the car would go?

A. Yes sir.

BLEED THROUGH– POOR COPY

Q. And isn't it a fact that those cars can be operated as [fol.173] fast as 50 to 60 miles an hour?

A. Well I couldn't swear to that because they have no speedometers.

Q. But you had it wide open, in other words?

A. That is right.

Q. And when you saw him, I presume, weren't you on a straightaway track?

A. Yes.

Q. And you had it wide open?

A. Yes sir.

Q. Now, Mr. Maxwell, I don't like to repeat, but I understand you said that from the time you saw Mr. Hunter's car you were traveling on a straight track just prior to the time you reached the curve?

A. Yes sir.

Q. And you said you had it wide open and the car was going as fast as you could make it go?

A. Yes sir.

Q. And Mr. Hunter's car was moving northward towards your car?

A. Yes sir.

Q. It had not stopped, had it?

A. No.

Webb: We waive the objection beginning on page 23, line 20, and the balance of the page is a discussion between counsel. Now, over to line 5 on page 24. The questions are by Mr. Wolfe.

Q. When you saw Mr. Hunter's car moving towards you, what did you do?

A. Put the air on, opened the door and jumped.

Q. Was there any other way you could have stopped that car of yours or check its speed?

A. No, that is the way we stop them, with air.

Q. With air brakes?

A. Yes sir.

Q. Did you "big gun" it, like the boys say?

A. Yes sir, I "big holed" it.

Q. You just threw that thing on all you could and you [fol. 174] opened the door and jumped?

A. Yes sir.

Q. All of us may not know what you mean, Mr. Maxwell, when you say you "big holed" it. What do you mean when you say you "big holed" it?

A. Put the air on in the emergency.

Q. In other words, you put on all the air you had, all the braking power you had?

A. Yes sir.

Q. And that was the emergency?

A. Yes sir, that is right.

Q. And I believe among railroaders and interurban operators when you say you big hole it that means you put it all on?

A. Yes sir.

Q. Is that all the braking power you had?

A. Yes sir.

Q. Was that all the braking power on that car on that occasion?

A. Yes.

Q. Did you big hole it immediately upon seeing that you were approaching his car and he was approaching you?

A. That is right.

Q. I mean, Mr. Hunter?

A. Yes.

Q. Immediately you applied the brakes?

A. Yes sir.

Q. When I say you applied the brakes I mean what you say when you say that you big holed it?

A. Yes sir.

Q. Mr. Maxwell, what effect does applying the brakes, the emergency, on the car, have on the power, the electric power?

A. On the power?

Q. Yes sir?

A. Well the brakes on the car don't have any effect on the power, on the trolley.

Q. Well at the time you applied the emergency on your car or big holed it, did you do anything with reference to cutting the power?

A. Yes sir, cut off the power.

Q. You cut off the power?

[fol. 175] A. Yes, sir. Did you say cut off or turn off?

Q. Did you cut if off or turn it off?

BLEED THROUGH- POOR COPY

A. Turn it off with the controller.

Q. And you did that on that occasion?

A. Yes sir.

Q. At approximately the same time that you applied the emergency?

A. Yes sir, I applied the emergency air brakes.

Q. Now did that car have sand that you let down on the rail?

A. No.

Q. Do any of the interurban cars carry sand that you know of?

A. Not the interurban cars, no, unless it has been put on recently.

Q. But they were not carrying it at that time?

A. No.

Q. Were there any other appliances on that car which could have been used to have stopped it that you didn't use?

A. Oh I don't think so—that would have been any advantage on that occasion.

Q. Do you know whether or not your car slid on the rails?

A. No sir.

Q. You don't know whether it did or not?

A. No sir.

Redirect examination.

Q. Mr. Maxwell, the accident occurred three-quarters of a mile north of the lake and all those buildings you testified about which were yellow in color?

A. Yes, approximately. From one-half to three-quarters.

Q. And there are some curves between: You couldn't have seen the lake where the collision occurred, could you?

A. No.

Q. Now then what time was the schedule that day to leave Denison and arrive in Sherman at the station?

A. 2:30 out of Denison and two minutes after 3:00 in Sherman.

[fol. 176] Q. How much is that? About 32 minutes?

A. That is right.

Q. Now it was your duty and you did stop at every street in the City of Denison?

A. No.

Q. Where anybody wanted to board your car or get off your car?

A. Well no, we have signs on the street that you stop at.

Q. Well how many, please sir?

A. I don't remember.

Q. About how many, approximately?

A. About eight or ten stops in the City of Denison.

Q. And how many in Sherman?

A. Oh I don't know how many stops there are in Sherman.

Q. Well I don't mean exactly. Approximately?

A. Well to the station in Sherman we will say there is twelve.

Q. Twelve?

A. Ten or twelve, something like that.

Q. Now was there a signal sign anywhere from Sherman to Denison to show what was going to happen there? I mean to show what should happen at that siding?

A. On the time card.

Q. I saw, was there any sign, I mean any signal device?

A. No.

Q. There was not any signal device?

A. No.

Q. Was there anybody at Woodlake whose duty it was to give orders to you men as to when to stop and where to stop?

A. No.

Q. All you had to go by was the time cards that were printed and given you?

A. That is right.

Q. Do you know when you were given your last time card?

A. The last change of schedule.

Q. When was that?

A. I don't have no idea.

Q. About when?

A. Well I couldn't tell you. I wouldn't say when it was because I don't remember just when it was. It was over [fol. 177-183] a period of months, though.

Q. Several months before you quit?

A. Several months before I was discharged.

Q. Do you know when Hunter got his last time card?

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A. Well we were all supposed to get them at the same time.

Q. About the same time? Several months before the accident?

A. That is right.

(Jury Given Recess and Then Brought In)

Gullett: I think the defendant rests.

Court: The defendant rests?

A. Yes, Your Honor.

Court: The defendant rests. Does the plaintiff rest?

Webb: No, sir.

(Jury Dismissed Until the Next Morning)

September 12, 1945.

[fol. 184] R. P. Hunter, the plaintiff, recalled to the witness stand, testified as follows:

Direct examination.

By Mr. Webb:

Q. For the purpose of the record, your name is R. P. [fol. 185] Hunter? You are the plaintiff, are you not?

A. Yes, sir.

Q. Mr. Hunter, you heard the testimony of Mr. L. T. Young?

A. That's right.

Q. Where he said that you said to him it was all his fault and he hated to end his career that way. Did you make that statement?

A. I did not.

Q. Did you make any statement like that?

A. No.

Q. Did you say "I"—"It is all my fault. I hated to end my career that way"?

A. No.

Q. Did you make that statement to Mr. Young?

A. No, sir.

Q. To anybody else?

A. No.

Q. Did you hear it stated?

A. I heard it read.

Q. And he asked was you hurt?

A. Yes.

Q. Mr. Young and Mr. Wooley asked whether you were hurt?

A. Yes.

Q. And you said "it was all my fault. I hated to end my career that way." Did you make that statement to Mr. Wooley?

A. No.

Q. To anybody else?

A. No.

Q. Did you ever make that statement to anybody?

A. No.

Q. Now, Mr. Hunter, do you know whether or not there is a mechanism of any kind under one of those cars, inter-urban cars, the one Maxwell was driving, that would show whether or not he put the car in reverse?

A. Yes, there is.

Q. Where is that located?

A. In the center of the car, underneath, on the lefthand side.

Q. What kind of location—what is it enclosed in?

A. In a steel or tin container.

Q. Did you ever get to inspect those cars, either of them, after that collision?

A. No, sir, I did not.

[fol. 186] Q. Did you have any mechanics yourself? Did you have any mechanics to inspect them?

A. No.

Q. Did they have a mechanic—I am talking about the defendant?

A. They had mechanics.

Q. They had them employed?

A. Yes.

Q. I will ask you to state to the court and jury whether or not, when a moving car is thrown into reverse it knocks out the block or braker, or whatever it is?

A. Braker.

Q. Whether or not that car will keep moving or will it stand still?

A. It will keep moving.

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Q. I will ask you whether or not you know that this block or braker was knocked out on that occasion, or it wasn't?

A. It was, yes.

Q. Do you have any electricians?

A. No.

Q. Have they?

A. Yes.

Q. Could they have operated any of their cars in that area without putting back that braker?

A. No.

Q. How many minutes would it take to put in a new braker?

A. He can put it back in within 30 seconds.

Q. And if he does put it back in, does it have electricity from Woodlake to Denison?

A. Yes.

Q. And if it isn't in there, is that line between Denison and Woodlake without juice?

A. It is.

Q. Did you or any of your agents, or any of your employees, or any of your people get to inspect those cars after that collision at all?

A. No.

Gullett. We object to that as calling for a conclusion and an opinion of the witness, and it is hearsay.

Court: Overruled.

Gullett: We except.

[fol. 187] Webb: You may have the witness.

Cross examination.

By Mr. Gullett:

Q. Mr. Hunter, don't you know that the Woodlake circuit is an automatic circuit and it is not manually operated?

A. At times it had to be manually operated.

Q. Was it on this occasion?

A. Yes, sir.

Q. You testified that your juice was off, and the lights were off the car, and the braker was off. How do you know?

A. From the action of Maxwell's car.

Q. Isn't it a fact that a car thrown in reverse, that the wheels lock?

A. It will for a second, and release and go.

Q. And starts up again?

A. It starts up again—

Q. And—

Woodrow: Let him answer.

A. What is the question?

Gullett: You answered my question.

A. I thought I did.

Woodrow: You talked and he stopped.

Gullett: The motor acts as a generator?

A. Yes, sir.

Q. When you throw it into reverse, the wheels lock and the motor gives up sufficient juice, it will build up and lock again?

A. Yes, sir.

Q. And continue until the car stops?

A. Yes.

Q. And the car, it reverses, and the wheels lock and it will not shoot 50 miles an hour?

A. It will go quite a distance.

Q. Not more than 50 feet?

A. More than that.

Q. How many?

A. 150 feet.

Q. Did Maxwell's car lock again?

A. It did not show.

Q. Then go another 100 feet?

[fol. 188] A. It did not show that it locked at all.

Q. If it was thrown into reverse, it would lock and go, and lock again?

A. It is supposed to, yes.

Q. If a man throws his air brakes on the car, and the air released, the wheels will slide and will go ahead?

A. About the sliding, it all depends on the condition of the rail. If the rail is slick, they will slide, but in a dry rail, it will not slide.

Q. Is it possible for the air to leak out?

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A. There is no way for the air to leak out without him releasing it.

Q. On this occasion, your testimony yesterday was that he threw his car in reverse, that it gave a lurch and came forwards 500 feet and never slowed up?

A. Yes, sir.

Q. Isn't that a physical impossibility?

A. No, it isn't. It happened out there.

Q. How do you reconcile with your testimony that it would not go over 100 feet—it would lock again?

A. Well, he didn't check it the second time that I could particularly notice.

Q. Mr. Hunter, you say the braker was out at Woodlake, and there was no juice and no lights?

A. That's right.

Q. And yet that car came up grade at 50 miles an hour, and never slacked speed?

A. Not that you could notice, no.

Q. You don't attempt to tell this jury what Maxwell did on that occasion out there—only from your observance of the car?

A. That's right.

Q. You were not close enough to know whether he set the air or not?

A. No.

Q. I believe you testified, or your wife testified, that since you had been off that you had been unable to do any [fol. 189] work?

A. That's right.

Q. On August 14, last year, you made an application for unemployment compensation?

A. Yes, sir.

Q. You went over to their office here in Sherman, or in Dallas—which place?

A. Sherman.

Q. You filled out that form and—that is a copy of the form you filled out?

A. Yes.

Q. The first paragraph reads: "I am registering for work at the Employment Office listed above; I am available for work and have been during period covered by this claim; and I am able to work and have been during period covered by this claim. This statement is filed as a claim

for any Unemployment Compensation Benefits that I may have coming to me as the result of my past employment and my possible continued total or partial unemployment." Did you receive anything from that Texas Unemployment Office?

A. I did not.

Q. You told them you were registering and you were able to work?

A. Certain kind of work, if I could do it.

Q. What kind of work could you do?

A. I didn't know. I was going to try to see if I could work.

Q. I believe you said you never received anything from this compensation?

A. After I found out I wasn't entitled to any, I didn't go back.

Q. You came under the Railroad Retirement Act?

A. Yes, sir.

Woodrow: We object to that as immaterial and irrelevant, and improper.

Court: Sustain the objection.

Gullett: We except. (To witness) Mr. Young and Mr. Wooley, you remember seeing them at the wreck?

[fol. 190] A. I remember seeing them.

Q. They came to the back of the car where you were laying?

A. I was sitting.

Q. Did they say anything to you?

A. They asked if I was hurt and how I felt.

Q. That part of the statement is correct?

A. Yes, sir, that is right—if I was hurt.

Q. And you told them you hated to end your career?

A. I told them my leg was hurt. I didn't make any such statement like that.

Q. You didn't make any such statement?

A. I did not.

Q. You stated awhile ago that this braker at the substation was manually operated at this station at Woodlake. How do you know that? Were you there?

A. No, some one told me.

Q. Were you there on that occasion?

A. No.

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Q. Then you don't know whether or not it was operated manually?

A. I don't know.

Q. You don't mean to convey to the jury that you are not positive of that?

A. Well, just like I said—it is hearsay.

Gullett: Comes the defendant, The Texas Electric Railway, and moves the Court to instruct the jury to disregard that part of the witness' statement wherein he stated that the braker at Woodlake was manually operated, and the witness now testifies that it is hearsay.

Court: Motion sustained, and the jury will disregard the statement of the witness.

Gullett: Now then, Mr. Hunter, all of your testimony predicated as to whether that braker was taken out, was based purely on hearsay, on the Maxwell car?

[fol. 191] Woodrow: We object to that as being a duplicate question—puts two or three issues in there—he can't answer correctly.

Court: Objection overruled.

Woodrow: We except.

Gullett: I believe that is all.

Redirect examination.

By Mr. Webb:

Q. Now, were you able to do any labor when you went to see about getting unemployment compensation?

A. No, I wasn't.

Gullett: We object to that as being a self-serving declaration.

Court: Overruled.

Gullett: We except.

Webb: Now do you—I believe you stated that you figured that they would have to find the kind of work you could do?

A. Yes.

Q. And you were willing to try it out?

A. To try it out, yes.

Q. If that station had been manually operated that day, would that block—would it have been knocked out when it was thrown in reverse?

A. Yes, sir.

Q. If it was automatically run, would that block be knocked out?

A. If it was in reverse?

Q. Yes?

A. Would the braker knock out?

Q. Yes?

A. Yes, it would.

Q. I am trying to understand this locking of wheels every 100 feet. If a car going 50 miles an hour is thrown into reverse to such an extent that it will knock the fuse at the substation, will it or not probably interfere or ruin the mechanism from which it operates?

A. It could do it.

[fol. 192] Q. If it checks every 100 feet, does it require the mechanism to be in working order for it to lock every 100 feet?

A. Yes, sir.

Q. Then if a car goes 50 miles an hour, going in reverse, it locks in a split second and knocks the fuse, and comes another 100 feet without showing brakes, would that indicate or not that thrown in reverse at that rate of speed would ruin the mechanism that operates that reverse principle?

A. That is right.

Recross examination.

By Mr. Gullett:

Q. It would have to blow your motors out?

A. You could burn a wire or two on the reverse.

Q. Is that all that is necessary to be done? As a matter of fact, it would have to blow out your motor?

A. Not necessarily, no sir. Understand, I am not an electrician. I am telling you from my observance. I think there is some wires on the reverse, underneath the car, if they burn out that does away from the stopping of the car and locking the wheels.

Q. Of course you don't know about that?

A. I didn't examine that.

Q. You were in the hospital some three weeks afterwards?

A. Yes, sir.

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Q. Did anybody from the Texas Electric Railway, or any agent, say that you couldn't look at the cars?

A. No.

Q. Those cars were available if you wanted to look at them?

A. They were in Dallas.

Q. If you wanted an examination or send some one down to inspect those cars, you could?

A. I suppose I could.

[fol. 193] Q. You didn't mean to infer that we wouldn't let you? Permission was never refused?

A. It was not refused and it was never asked.

Q. You didn't take the trouble to inspect?

A. No.

Q. The unfortunate part of that was because you were in the hospital for three weeks on the flat of your back?

A. That's right.

Q. Mr. Hunter, after you ran that meet and saw that the other car was coming, you were excited at the time?

A. No, sir, I was not.

Q. You were not the least bit excited?

A. No.

Redirect examination.

By Mr. Webb:

Q. If you had been excited, you wouldn't throw your car in reverse—

Gullett: Object as leading and argumentative.

Court: Sustain the objection.

Webb: Stand aside. That is all.

(Jury Retired)

(Discussion was had between Court, Counsel and Witness, which was not to be considered part of the record in this case, and therefore is not transcribed herein.)

(Jury brought in)

Webb: May I ask a question?

Court: Yes, sir.

Q. Mr. Hunter, at what point, when a car is put in reverse, is it the proper thing or usual thing to put it in

reverse before it comes to a complete stop, or after it comes to a complete stop?

A. After.

Gullett: Will you please retire the jury again for the purpose of making my objection?

[fol. 194] Court: All right.

(Jury retired)

Gullett: Comes now the defendant, The Texas Electric Railway Company, in the absence of the jury, and herenow moves the Court to declare a mistrial in this cause for the following reasons and causes to-wit: The defendant respectfully submits that both sides had closed their testimony in chief.

Webb: Both sides had rested.

Gullett: That the Court adjourned at 4:30 on Tuesday afternoon, September 11, 1945; that the jury was called to the box at 9:30 on Wednesday, September 12, 1945; that the plaintiff placed upon the stand first Mrs. R. P. Hunter, the wife of the plaintiff R. P. Hunter, who was permitted to testify over the objection of the defendant; that the next witness placed on the stand on redirect examination was the plaintiff himself, Mr. R. P. Hunter; said R. P. Hunter was placed on the stand not only for redirect examination but also for rebuttal; that after the witness R. P. Hunter had been interrogated both by the attorneys for the plaintiff and attorneys for the defendant, at length, and that the attorneys for the plaintiff and the attorneys for the defendant had finished questioning the witness R. P. Hunter, and announced to the court that there was no further questions from this witness, the Court on his own motion retired the jury and interrogated the witness himself with reference to certain matters pertaining to the stopping of the Maxwell car and other matters which are fully set out in the stenographic notes herein; that upon the return of the jury, and being guided [fol. 195] by the interrogatories by the Court in the absence of the jury, the attorney for the plaintiff then began questioning and interrogating the witness with reference to matters inquired about by the Court, to which further interrogation on matters inquired about by the Court the defendant here now objects, and moves the Court for a

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mistrial for the reason that the defendant had undue advantage taken of it by the Court, and the Court by its actions has interfered with the trial of the cause in that the attorneys for the plaintiff have now taken advantage of the very matters inquired about by the Court.

Woodrow: We would like the record to disclose the true facts: that this witness was still in the witness box and we did not close our examination. That this is an attempt to impeach the Judge of this court. We have asked this witness questions on matters that we not only have pleased but have also interrogated upon and have well in mind. We would have asked the questions anyway, and we take the position that the motion not only be overruled but that the attorney should be criticized or admonished for making this attack on this Judge of this court, who has been fair to both sides. This interrogation by the Court was entirely proper. That motion should be overruled, and immediately, and with some admonitions to counsel.

Gullett: I don't appreciate counsel telling me how to conduct my lawsuit. Let the record show that I made the motion respectfully to the court.

Court: All right. Motion overruled.

(Jury brought in)

[fol. 196] Court: Anything further, gentlemen?

Webb: One other question: Mr. Hunter, what is the usual and customary and proper way of bringing one of those cars to a stop? It doesn't matter at what rate of speed, 15 or 20 miles an hour?

Gullett: We object, first, because it is leading, and second, for the reasons set out in defendant's motion heretofore filed with the court.

Court: What was the first objection?

Gullett: First, that it was leading, and second, for the reasons set out in the motion heretofore filed.

Court: Overruled.

Gullett: We except.

A. Just a straight application of the air is the safest and quickest way to stop a car.

Q. Is it correct to apply the air and put it in reverse, too?

A. No.

Gullett: Object to leading.

Court: Sustained. I think the question was leading, and don't consider the answer of the witness.

Webb: In bringing the car to a stop, going at a rapid rate of speed, the usual way is not to reverse it?

A. No.

Q. What rate of speed is it usual or customary—do you know which is a quicker way to stop a car without damage to the car or passengers, going at a rapid rate of speed? Is it to throw into the big hole or just throw a general application of the air?

A. Just a general application of the air.

Q. Is it proper to throw it into the big hole?

A. You don't get the service out of it that you would by [fol. 197] using the straight application of air.

Q. That is all.

Court: Anything further from this witness?

Webb: We tender the witness to the opposition.

Gullett: We have no questions.

Webb: We have no questions.

Gullett: Are you through with the witness this time?

Woodrow: We don't care to make that statement now.

Court: I can't tell whether they are through with the witness or not.

Webb: We rest.

Wolfe: Does he rest or close?

Court: I will ask counsel to answer that question.

Webb: Yes, sir. We close. I didn't want to close until they are willing to close. That is all.

(Witness leaves witness stand)

Wolfe: Will Your Honor give us a couple of more minutes?

Court: Yes, sir. Gentlemen, we will take a 10-minute recess.

(Jury retired)

(Jury brought in)

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Court: Both sides close.

[fol. 198] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 199] Judge's Certificate to Statement of Facts

The State of Texas,
County of Grayson:

I, Jesse F. Holt, Special Judge of the 15th Judicial District of Texas, do hereby certify that the above and foregoing is a true, full, correct and complete statement of all the facts proved in Cause No. 52,920, R. P. Hunter vs. The Texas Electric Railway Company, tried before me in the 15th Judicial District of Texas in Grayson County, Texas, beginning on September 10, 1945, and concluding on September 14, 1945, in question and answer form, including all objections as to the admission or exclusion of evidence, or other matters, and the exceptions taken thereto; and after having first caused notice of the filing of same in duplicate to be given to counsel for plaintiff and counsel for defendant, and no objections having been made thereto, I do hereby approve the same and order it filed as the Statement of Facts in question and answer form in this case.

Witness my hand officially at Sherman, Texas, on the .....day of October, A. D. 1945.

Jesse F. Holt, Special Judge 15th Judicial District of Texas.

Here Follows, Photolithograph, side folio 200

[fol. 201-246] IN THE COURT OF CIVIL APPEALS

ORDER TRANSFERRING CAUSE FROM FIFTH COURT OF CIVIL APPEALS, DALLAS, TEXAS, TO COURT OF CIVIL APPEALS, FOR THIRD SUPREME JUDICIAL DISTRICT, AT AUSTIN, TEXAS. JANUARY 9, 1946

No. 13693

R. P. HUNTER

vs.

TEXAS ELECTRIC RAILWAY CO.

From Grayson County

It is ordered that this cause be transferred to the Court of Civil Appeals for the Third Supreme Judicial District at Austin, Texas, and that the Clerk of this Court certify all orders made and cost accrued in this court, and transmit all the papers in this cause to the Clerk of said Third District.

[fol. 247] IN COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT

No. 9552

R. P. HUNTER, *Appellant*

vs.

THE TEXAS ELECTRIC RAILWAY COMPANY, *Appellee*

APPEAL FROM THE FIFTEENTH JUDICIAL DISTRICT COURT OF GRAYSON COUNTY, TEXAS

OPINION April 24, 1946

Appellant, R. P. Hunter, sued appellee, Texas Electric Railway Company, to recover damages for personal injuries sustained in a head-on collision between an electric motor car driven by himself and a similar one driven by T. N. Maxwell. Appellant admitted that in violation of his time card instruction and the rules of appellee he proceeded

about three-fourths of a mile beyond the siding where he was to meet and pass the car driven by Maxwell, which fact caused the collision between the cars. In consequence the trial court submitted only issues of discovered peril, which the jury found against appellant; and conditionally on having answered "no" to the discovered peril issue, an issue as to whether the negligence of appellant in passing the meeting point was the sole proximate cause of the collision, which the jury answered in the affirmative. Accordingly judgment was rendered for appellee.

Appellant contended that his pleadings and evidence raised jury issues on three acts of negligence as the proximate cause of the collision, and that the court erred in refusing to submit his requested special issues for jury findings thereon. The three acts of negligence were as follows:

1. That appellee was negligent in failing to provide an automatic block device in the sector of the collision, or in employing the time card system it did for the passage of cars in the sector of the collision.

2. That the operator (Maxwell) of the southbound car failed to properly slow down his car before the collision.

[fol. 248] 3. That Maxwell failed to apply the brakes on his car as he approached the point of the collision.

The testimony of appellant having shown as a matter of law that his negligence in violating his time card instruction and the rules of appellee in passing the meeting point without performing the mandatory duties devolving upon him under the rules of appellee was the sole proximate cause of this collision, the only issues that need be submitted were those relating to discovered peril. And the jury having found those issues against appellant he is not entitled to recover.

The evidence shows that appellee railway line here involved is operated between the cities of Sherman and Denison. Appellee operates electrically propelled interurban cars for carrying passengers and freight for hire, and is engaged in interstate commerce. Each passenger car is operated by one man known as an operator. To facilitate the movement of cars, called trains, between Sherman and Denison appellee furnished each operator

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daily with a time card. The time card under which appellant was operating at the time of the collision was hung on a hook immediately in front of where he was seated on the left-hand front of the car. It required five trips daily by him from Sherman to Denison, a distance of 10 miles, and this schedule had been the same for the previous six months. Appellant had been employed by appellee or its predecessors for about 32 years, the first 8 years as a dispatcher handling the movement of cars or trains, and the last 24 years as an operator, and for the last 11 years he had operated a one man car or train over this route between Sherman and Denison under the time card method or system. The time card required appellant to meet, wait for, and pass the car operated by Maxwell at a siding called Woodlake. On May 2, 1944, on his fourth trip for the day, appellant left Sherman at 2:30 on schedule time, going north to Denison. He was operating "Train No. 58," which was to meet, wait for, and pass "Train No. 15," [fol. 249] operated by Maxwell at 2:45 at Woodlake. The time card and rules of appellee required appellant wait there for the Maxwell train to pass on the siding, and if the Maxwell train should display a certain flag showing another section or extra train following, to wait until same had passed on the siding before he should proceed. If the Maxwell train or car were late, appellant was required under the rule to go to the nearby phone booth of appellee and call the dispatcher for further orders before proceeding.

Appellant testified that he reached Woodlake about on time; that he glanced over his shoulder and thought he saw Maxwell's car on the siding; that in about one-half of a minute, without looking for any flag that might be displayed or without phoning the dispatcher, he passed the meeting point and had proceeded about three-fourths of a mile when he saw the Maxwell car coming around a curve very fast, and the collision occurred at about 2:47. Appellant testified that when he saw Maxwell's car he brought his car to about a stop; that Maxwell, judging from the action of his car, appeared to have thrown it in reverse, a method of stopping it quickly, and then Maxwell jumped from the door of his car, which proceeded to the point of the collision, the impact of which crushed the front end of both cars, breaking appellant's leg, and otherwise in-

juring him, and also injuring a number of passengers. Appellant admitted that he violated the instruction on his time card and the rules of the company in proceeding beyond the meeting point, and as to the cause of the collision appellant testified:

"Q. Now, No. 15 was coming along in a southerly direction. That is where he is supposed to be? A. Yes, sir.

Q. At that time, you were supposed to be waiting back at Woodlake? A. Yes, sir.

Q. And you didn't wait for him at Woodlake, as the [fol. 250] time card required you to do? A. I didn't, no.

Q. And you passed that meeting point and met him down at the curve? Q. Yes.

* * * * * * * *

Q. During all that time you had been following this regular schedule that you outlined to the jury, leaving Sherman at those various times? A. Yes, sir.

Q. This is the only time in the six months' period that you failed to stop and wait for No. 15 at Woodlake, or call the dispatcher? A. That's right.

Q. If you had failed to call the dispatcher or waited at Woodlake prior to May 2nd, you would have had the accident prior to this time? A. Yes, the chances are.

Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake, as the time card and rules required you to, this would not have happened?

A. No.

* * * * * * * *

Q. What caused the accident? A. Two cars collided.

Q. What caused the two cars to collide?

A. Because they were on single tracks.

Q. Is there any other reason, Mr. Hunter?

A. Because they passed the meeting point.

Q. Who did? A. I did."

Under the foregoing facts no excuse was offered by appellant as to why he violated the instruction on his time card and the rules of the appellee. The particular instruc-

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tion on the time card and the rules of appellee were to avert collisions. Appellant had been operating under them for a long period of years. The time card was immediately before appellant on the hook on which it was required to be and his violation of it and the other rules, which he admitted, caused the collision. The rule is settled in Texas that where an injured trainman is at fault, or where his injury is due to his own violation of the rules of the railroad company, or where he has neglected to comply with a train order, he is precluded from recovering. This rule of law is stated in 29 Tex. Jur. 339, Sec. 197, as follows:

> "• • • except in a case to which the rule of discovered peril applies, one whose injury was due to his own [fol. 251] violation of some statute or of a rule of the company, or who had neglected to comply with a train order or to give necessary orders to other trainmen, is precluded from recovering—at least, in the absence of some exonerating circumstances. Other fault on the part of the injured trainman is similarly a ground for denying a recovery, provided it is of itself the efficient cause of the injury."

The following cases support the test: Texas Traction Co. v. Nenney, 178 S.W. 797, error refused; Missouri K. & T. R. Co. v. Rogers, 100 Tex. 203, 97 S.W. 461, 126 S.W. 613; Missouri K. & T. R. Co. v. Johnson, 92 Tex. 380, 48 S.W. 568; Lancaster v. Jarrett, 258 S.W. 271, 267 S.W. 518; Unadilla Valley v. Caldine, 278 U.S. 139, 73 L. Ed. 224; Galveston, H. & S. A. Ry. Co. v. Brown, 92 Tex. 2, 63 S.W. 305; Missouri, Pac. R. Co. v. Jones, (Com. App.) 24 S.W. (2d) 32.

It is true that appellant alleged that appellee railway company was negligent in the three respects stated, and that each of such acts constituted negligence and a proximate cause of his injury, but under his foregoing testimony his own disobedience of the time card instruction and the rules of appellee caused the collision and injury to himself. In consequence neither the provisions of the Federal Employees' Liability Act (Title 45, Sec. 51, U.S.C. Anno.) nor of Art. 6440 of the Revised Statutes of Texas have any application to the instant case. These statutes require the injured employee to allege and prove that his employer

was negligent and that such negligence was the proximate cause in whole or in part of the injury sustained by him. Such statutes have no application where the violation of a train order or rule is by the employee and the disobedience whereof was the sole efficient cause of the accident.

In the Caldine case, supra, the court held that no recovery can be had under the Federal Employees' Liability Act for the death of a conductor who orders his train to proceed when reaching a point where his written orders require him to pass a train from the opposite direction, which had not arrived.

In Davis v. Kennedy, 266 U.S. 147, 69 L. ed. 212, it was [fol. 252] held that where it was the personal duty of an engineer to ascertain whether another train had passed, under instructions never to pass a point from which only a single track led unless he knew as a fact that another train had passed, no recovery can be had under the Federal Act for his death when he ran his train out on a main track before knowing that a train from the opposite direction had passed.

There was no proof whatever that the time card system was inadequate, and the evidence showed that if a block signal system had been installed it would have added nothing to the positive time card instruction and the rules of appellee, which appellant violated without cause, and which was the sole efficient cause of the collision and his injury. These facts are entirely analogous to the facts in the case of Southern R. Co. v. Youngblood, 286 U.S. 313, 76 L. ed. 1124, wherein a conductor failed to obey a written order to pass another train at a stated point, in consequence of which a head-on collision occurred, killing the conductor, the court held with respect to a later verbal order which merely required the conductor to carry out his written order in hand, as follows:

> "The case comes to this: that respondent's intestate had clear and definite orders which if obeyed would have avoided the accident and the disobedience whereof was the sole efficient cause of his death. As said in Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 142 L. ed. 224, 232, 49 S. Ct. 91:
>
> "A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause

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of his act. Caldine had a plain duty and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey."

The court submitted the issue of sole proximate cause conditionally upon a negative answer to the preceding issues of discovered peril. Appellant contends that since the court submitted no issue of primary negligence on the part of appellee, and submitted only the issues of discovered peril, the submission of the issue of sole proximate cause as it did was calculated to cause the jury to believe that it was the belief of the court that the prior negligence [fol. 253] of appellant in passing the meeting point was important and to cause the jury to take that part into consideration in answering the special issues on discovered peril as it did.

The conditional submission of the issue of sole proximate cause is not subject to the objection made by appellant. Rule 277 TRCP expressly authorizes the conditional submission of special issues. There was nothing in the method of submission of the issue which was calculated to confuse or mislead the jury. Maryland Casualty Co. v. Hearks (Sup Ct) 190 S.W. (2d) 62. The issues of discovered peril were submitted unconditionally and the jury found such issues against appellant. The fact that the jury may have found in answer to the issues of damages that appellant received "none" does not show prejudice in the method of submitting the issues of discovered peril. Southern Pine Lumber Co. v. Andrane, 132 Tex. 372.

Appellant having admitted that he violated his specific time card instruction and the rules of appellee in proceeding beyond the meeting point for passing the Maxwell car, he can not recover for injuries sustained as the result of the collision caused by his own disobedience of the instruction and rules of appellee. The rules stated in the foregoing Texas and Federal decisions deny appellant any recovery under the facts of this case.

The judgment of the trial court is affirmed.

M. B. Blair, Associate Justice

Affirmed.

Filed: April 24, 1946.

[fol. 254] IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN, TEXAS.

No. 9552

R. P. HUNTER

v.

TEXAS ELECTRIC RAILWAY COMPANY

APPEAL FROM DISTRICT COURT OF GRAYSON COUNTY
OPINION BY ASSOCIATE JUSTICE BLAIR

JUDGMENT RENDERED AND ENTERED

April 24, 1946

This cause came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjusted and ordered that the judgment of the trial court be, and same is hereby in all things affirmed; that the appellant, R. P. Hunter, pay all costs in this behalf expended, and that this decision be certified below for observance.

[fol. 255] IN THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT AT DALLAS

[Title omitted]

APPELLANT'S MOTION FOR REHEARING—Filed May 4, 1946

Now comes the appellant in the above numbered and entitled cause, and respectfully moves the Court to set aside the judgment of this Court, entered on the 24th day of April, A.D. 1946, affirming judgment of the trial court, and to grant him a .... hearing and to reverse and remand said cause; and, therefor, says:

I

That the Court erred in overruling assignments of error Numbers 2 and 8 (Tr. pages 50, 51), thereby holding in effect that appellant's pleadings and evidence did not raise

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jury issues, and thereby holding in effect that there was no evidence to support said issues, on the following act of negligence as a proximate cause of the collision:

[fol. 256] 1. That the appellee was negligent in failing to provide an automatic block signal device in the sector of the collision.

II

That the Court erred in overruling assignments of error Numbers 3 and 9 (Tr. pages 50, 51), thereby holding in effect that appellant's pleadings and evidence did not raise jury issues, and thereby holding in effect that there was no evidence to support said issues, on the following act of negligence as a proximate cause of the collision:

1. That the appellee was negligent in employing the system it did for the passage of traffic in the sector of the collision.

III

That the Court erred in overruling assignment of error Number 14, thereby holding in effect that the submission of the issue of sole proximate cause was not calculated to confuse or mislead the jury, and was not improperly embodied in the charge, even though appellant had been denied submission of all the issues of primary negligence raised by the pleadings and the evidence.

IV

That the Court erred in overruling assignments of error Numbers 7 and 13, thereby holding in effect that appellant's pleadings and evidence did not raise jury issues, and thereby holding in effect that there was no evidence to support said issues on the following act of negligence as a proximate cause of the collision:

1. That the appellee was negligent in that the south bound motorman failed to properly slow down his car before reaching the point of collision.

V.

That the Court erred in overruling assignments of error Numbers 4 and 10, thereby holding in effect that appellant's [fol. 257] pleadings and evidence did not raise jury issues, and thereby holding in effect that there was no evidence

to support said issues, on the following act of negligence as a proximate cause of the collision:

1. That the appellee was negligent in that the south bound motorman railed to apply his air brakes as he approached the point of collision.

Wherefore, premises considered, appellant prays that this Court set aside the judgment entered on the 24th day of April, 1946, affirming the judgment of the trial court, and that it grant him a—hearing, and reverse and remand said cause.

He prays further for all other relief, general and special, to which he may be at law and in equity entitled.

Attorneys of record for appellee are Freeman, Wolfe & Keith with offices located in Sherman, Grayson County, Texas; and Gullett & Gullett, with offices located in Denison, Grayson County, Texas. Mr. Joe Keith of Freeman, Wolfe & Keith, has been delivered a copy of this motion for rehearing; and Mr. Alexander Gullett, of Gullett & Gullett, has been delivered a copy of this motion for rehearing.

O. H. Woodrow, Sherman, Texas, Webb, Elliott & Rogers, Sherman, Texas, By F. Neilson Rogers, Attorneys for Appellant.

[File endorsement omitted]

[fol. 258-261] In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin

Motion No. 10,263, Cause No. 9552

Order Overruling Appellant's Motion for Rehearing—

May 8, 1946

R. P. Hunter

vs.

Texas Electric Railway Company

Appeal from District Court of Grayson County.

Appellant's motion for rehearing.
Motion is submitted and overruled.

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[fol. 262] IN THE

SUPREME COURT OF THE STATE OF TEXAS

R. P. HUNTER, *Petitioner*

vs.

THE TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

APPLICATION FOR WRIT OF ERROR—Filed June 4, 1946

To the Supreme Court of the State of Texas:

Statement of the Case

This is a suit for damages under the Federal Employers' Liability Act. Damages, in excess of $1,000.00, are sought for personal injuries sustained by petitioner, motorman in a head-on collision between two or respondent's railway cars. The first paragraph of the opinion of the Court of Civil Appeals correctly states the nature and result of the suit.

[fol. 263] *Statement of Jurisdiction*

The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728, R.C.S. 1925.

It is thought that the Supreme Court also has jurisdiction of this suit under Subdivision 3 of Article 1728, R.C.S. 1925.

Points of Error

1. The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision.

2. The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in employing the system it did for the passage of traffic in the sector of the collision.

3. The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to properly slow down his car before reaching the point of collision.

4. The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision.

5. The error of the Court in submitting Special Issue No. 6, concerning sole proximate cause, to the jury over the objections of petitioner.

[fol. 264] *First Point of Error*

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision. (Germane to Assignments of Error Nos. 2 and 8. Tr. 50-51).

Brief of the Argument

Petitioner contends that he was denied a trial by jury upon the submissible issues of liability against respondent. His contention in this regard cannot now be affected by contained findings upon issues of discovered peril. Hines v. Foreman, 243, S.W. 479; Dallas Railway Term. Co. v. Bankston, 51 S.W. (2d) 304.

In its opinion, the Court of Civil Appeals conceded that the allegations of initial liability against respondent were sufficient. However, because of the view it entertained and of the ultimate disposition made of the case, the Court of Civil Appeals completely pretermitted any discussion or statement of petitioner's testimony that so forcefully necessitated the submission of negligence and causation issues against respondent. But such judicial casuistry cannot be indulged in here. Listen to the testimony as it came from the lips of the witness:

> "A block signal system would have stopped me when a time card did not, because there would have been a red light. (S.F. 50). An automatic block signal is an automatic light set-up, showing red—it would have shown red in my face of the other fellow coming. [fol. 265] Between Woodlake and Denison they used to have automatic block signals installed. (S.F. 50). They used to have that red signal to stop if there was danger between Woodlake and Denison. (S.F. 40). *If*

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they had retained the safety devices they had then with the red signal showing the road was not clear ahead, I would have had a warning and would have stopped. (S.F. 45)." (Italics ours).

This testimony alone, and in conjunction with other testimony in the record, with forceful and compelling clarity raised the issues against respondent and commanded their submission.

These safety devices are in common use by railroads for the averting of accidents under these conditions. The evidence is uncontradicted that such safety devices for the protection of petitioner and others and for the prevention of identical and similar accidents were once installed and since removed, and if they had not been removed would have avoided this collision. In any event it was a question for the trier of fact. In Eglsaer v. Scandrett (CCA 7th, 1945) 151 Fed. (2d) 562, the Court said:

" 'Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of car, the default of a stranger to the employment, an act of God, or pure accident, or from a combination of any of these factors, but after logic has thus determined the causal basis of the injury the statute steps in to say that if among these causes there is negligence on the part of the employer as that term is understood in the act, liability of the employer shall follow irrespective of the other factors causally [fol. 266] related in whole or in part from negligence even if the negligence of the injured employee or some other factor was logically nearer to or more influential in producing that injury. • • • • *These words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases.* • • • • These words suggest that there may be a plurality of causes each of which is sufficient to permit a jury to assess liability.' " (Italics ours).

In Bailey v. Central Vermont R. Co. (U. S. Sup. Ct. 1943), 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062, the Court said:

"The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence', Jacobs

> v. N. Y., 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854. • • • • It is a part and parcel of the remedy afforded railway workers under the Employers' Liability Act. • • • • Reasonable care and cause and effect are as illusive here as in other fields but the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. • • • • *To deprive these workers of the benefit of a trial by jury in close or doubtful cases is to take away a goodly portion of the relief Congress has afforded them.*" (Italics ours).

The Court of Civil Appeals concluded as a matter of law that the failure to install an automatic block signal device was non-negligence because "• • • • the evidence showed that if a block signal system had been installed it would have added nothing to positive time card instructions of appellee • •". Or if it was negligence, then it was not actionable negligence—it not being a proximate cause. [fol. 267] Regardless of the name attached or the rigors of reason that brought it forth—regardless of what artifice of logic was utilized in evading the submission of these issues and depriving petitioner of his right to a trial by jury—the result and the effect is the same. It is assumption of risk—pure and simple—artfully arrived at by devious reasoning. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 ALR 967. Owens v. Union Pacific R. Co., 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271. Stoffel v. McCahan Sugar Refining & Molasses Co., 35 Fed (2d) 602. Schlemmer v. Buffalo, Rochester and Pittsburg R. Co., 205 U. S. 1, 51 L. Ed. 681, 27 S. Ct. 407.

It is obvious that the trial court and respondent's counsel were proceeding upon this misguided theory when there was filed and permitted to be filed the following trial amendment in the middle of the trial:

> "That the injury received by the plaintiff herein on the occasion in question, if any, resulted solely from a risk he assumed incident to, in the furtherance of, and connected with his employment with the defendant." (Tr. 13, S. F. 71).

This is a "primary duty rule" case. In its fundamental aspect no attempt has been made to "look at the situa-

tion as a practical unit rather than inquire into a purely logical priority". Union Pacific R. Co. v. Hadley, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318. If any searching analysis had been made it would have been apparent that the theory [fol. 268] and effect of the disposition of this case was in direct defiance of the will of Congress. 45 USCA 695, Title 45, Sect. 54 as amended, 10-A FCA 139, Title 45, Sect. 54 as amended.

We quote from Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 ALR 967:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment and Congress by abolishing the defense of assumption of risk in that statute did not mean to leave open the identical defense of the master by changing the name to 'non-negligence' ".

It is apparent that the trial court and particularly the Court of Civil Appeals seized upon Davis v. Kennedy, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 33; Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; and the other "primary duty rule" cases, and in the instant case forced an effect here that resulted in those cases.

It is also clear that application of the "primary duty rule" has been made here in which the contributory negligence of Hunter through violation of a company rule has become assumption of risk. This is no longer the law.

It is not here contended that Hunter may not have been found guilty of contributory negligence of violating a rule of the company which it was his primary duty to obey. It is simply contended that in doing so he did not assume the risk of his master's negligence and that he was entitled to a submission of these negligence issues.

[fol. 269] The cases relied on by respondent and the Court of Civil Appeals have been named and overruled by the Supreme Court of the United States.

Quoting again from Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 ALR 967:

> "Aside from the difficulty of distinguishing between contributory negligence and assumption of risk, many other problems arose. *One of these was the applica-*

tion of the 'primary duty rule' in which contributory negligence through the violation of a company rule became assumption of risk. Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; Davis v. Kennedy, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 33. • • • • *It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called.* • • • • The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all of its various forms of contributory negligence, the fellow servant rule and assumption of risk, must not contrary to the will of Congress be allowed recrudescence under any other label in the common law lexicon. • • • • *No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence under proper charge from the court should be submitted to the jury for their determination.*" (Italics ours).

The opinion of the Court of Civil Appeals reveals that it could have labored under no greater misapprehension of the law than it did. The Court of Civil Appeals by its opinion attempted to re-write into the Employers' Liability Act an exception that Congress in clear, unmistakable language wrote out of it. Congress did not say that certain [fol. 270] risks would be assumed in the event of violation of a primary duty. Instead, it obliterated every vestige of assumed risk. The spectre of that narrow, illiberal, judicial reasoning that has scored the railroad worker these many years has again reared its ugly head.

Petitioner earnestly insists that the opinion of the Court of Civil Appeals wholly, incorrectly and wrongfully states the law of this case and he earnestly insists that he was denied the right of trial by jury in the refusal to submit his liability issues against respondent.

Second Point of Error

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in employing

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the system it did for the passage of traffic in the sector of the collision.

Brief of the Argument

It is necessary to quote pertinent portions of petitioner's testimony:

> "Right below the motorman's window is a train number box which is the number of your train. On this occasion I looked over my shoulder and thought I saw the man there. I did not definitely ascertain whether he was train 15 or whether he was carrying any signals. I didn't ascertain that that man had classification signals or car classification (S.F. 20). I went by there and I thought I saw him over there. It could have been an extra in there. I stopped there and waited there a half a minute and looked over my shoulders and said, 'There he is'. He didn't blow any signal. He was supposed to if he was carrying a green flag. (S. F. 49). My visibility was good that day. There was nothing to obstruct my view from seeing the car until I got to the stop. I did not see the man when I got to the pass. Then I got down there and looked over my shoulder. I had passed the telephone booth then and it appeared that it was a place there by the interurban. (S. F. 51)".

[fol. 271] It further appears from petitioner's testimony, in substance, that respondent's cars were formerly manned by a conductor and a motorman but that during the depression years of the early 'thirties' the conductor was removed and his duties assumed by the motorman (S. F. 5). His duties consisted in operating the car, reading the time card, making meeting points, identifying the cars, collecting fares, making out duplicate cash fare receipts, issuing the passenger a duplicate receipt, making change, fixing the trolley and doing everything there was to do (S. F. 39-40). All of these duties had been performed by Hunter for approximately ten years prior to the collision but under different circumstances. The volume of passengers and traffic at the time of the collision had increased ten-fold since the time the conductor had been removed (S. F. 48).

It is clear from the foregoing testimony that respondent, during the bleak, poverty-stricken, years of the early

'thirties' had retrenched its operating expenses by reducing its personnel and placing upon the shoulders of petitioner the multiplied responsibilities and duties of more than one man. It no longer left the motorman free to devote his exclusive attention to the operation of the car. But with the return of fruitful years and inordinate transportation burdens—while this nation writhed in the throes of an unparalleled transportation crisis—respondent railway, growing sleek and thoughtless, while its transportation and revenues mounted ten-fold, did not see fit to place [fol. 272] conductors again upon its cars and lighten the burden of those situated as was petitioner. Instead, it chose to permit time and changing conditions to create a negligent and dangerous system for the passage of traffic in the Woodlake sector that finally resulted in the collision.

It is submitted that the conclusion created and inference to be drawn from the foregoing testimony is that there was another car, possibly an extra, at or near the Woodlake passing track which petitioner, looking over his shoulder, concluded to be train number 15. It developed that the car concluded to be number 15 was not in fact number 15. Proceeding further with this conclusion, the most that could be said was that Hunter's negligence consisted in failing to identify the car he thought he saw as number 15. It further appears from the testimony that the method of identification of a particular train was by the numbers contained in the train number box. It does not appear that the car, possibly an extra, which Hunter contended he took to be number 15 had any numbers in the train number box, or, if it did, what those numbers were. There is no testimony showing that the train box numbers, if there were any, were visible to Hunter under the conditions and circumstances prevailing at the Woodlake sector. Hunter knew he was to meet number 15 at Woodlake. The time card instruction added nothing to his knowledge.

It is contended that the method of providing identification by numbers alone, in the light of all the multiplied and additional duties that had been vested upon petitioner [fol. 273] and not removed although traffic had increased ten-fold, was negligence. It is an inference and a conclusion that a jury would have been warranted in drawing. The Court of Civil Appeals entirely misunderstood the contention here made.

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Petitioner submits that this was an issuable fact of negligence which he was entitled to have submitted to the jury and that error was committed in not so doing. The effect of the holding of the trial court and the Court of Civil Appeals is to compel petitioner to assume the risk of this negligence. Petitioner here adopts in support of this contention the argument advanced under his First Point of Error.

Third Point of Error

The error of the court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to properly slow down his car before reaching the point of collision. (Germane to Assignments of Error Nos. 7 and 13. Tr. 51-52).

Fourth Point of Error

The error of the court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failure to apply his air brakes as he approached the point of collision. (Germane to Assignments of Error Nos. 4 and 10. Tr. 51-52).

[fol. 274] *Brief of the Argument*

The third and fourth points of error are germane to each other and can be properly covered together.

These issues were raised by the testimony of Maxwell, the southbound motorman, which, in substance, is materially as follows;

> "I was driving as fast as the car would go. (S. F. 100). I wouldn't swear how fast they would go because they have no speedometers. But I had it wide open. I was on a straight-away track when I saw him and I had it wide open. When I saw Mr. Hunter's car I was on a straight-away track just prior to the time I reached the curve. I had it wide open—the car was going just as fast as I could make it go. (S. F. 101)."

It is evident that the southbound motorman was on a straight-away track with his car wide open. It was going as fast as it was possible to make it go. This was on a straight-away track going into a curve. It was certainly

testimony from which a jury may have concluded that the southbound motorman was failing to use the care that an ordinarily prudent person would have used under the same or similar circumstances. It is not sufficient to contend that Hunter's presence could not have been foreseen. The presence of someone rightfully upon the track could have been foreseen. It might have been a section crew. It might have been a hand-car. It might have been a stalled car. It might have been any combination of things. It was certainly an issuable fact for a jury to say whether or not these acts set out in the foregoing testimony were negligence. The effect of the holding of the trial court and of [fol. 275] the Court of Civil Appeals has visited upon this petitioner and forced him to assume the risk of these acts of neligence on the part of the southbound motorman. In support of this argument petitioner here adopts the argument advanced under his First Point of Error.

Fifth Point of Error

The error of the Court in submitting Special Issue No. 6, concerning sole proximate cause, to the jury over the objections of petitioner. (Germane to Assignment of Error No. 14. Tr. 52-53).

Brief of the Argument

The court submitted the following special issue:

> "SPECIAL ISSUE NO. 6:
>
> Do you find from a preponderance of the evidence that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the southbound interurban on the occasion in question was the sole proximate cause of the injuries, if any, he received? Answer 'Yes' or 'No' (Tr. 37)."

Objection was properly registered and exception properly preserved.

Under the Federal Employers' Liability Act a jury finding of sole proximate cause on the part of plaintiff has no logical place. Its only efficacy would be to accomplish a conflict of findings. In and of itself such a finding would not logically defeat liability. In order for such a finding to defeat liability it must be accompanied by a finding that

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defendant's negligence was not a proximate cause of the [fol. 276] injury, but in that event liability would have been defeated anyhow. This was the trend of thought that occurred to the Court in International Great Northern R. Co. v. Acker (Civ. App. 1939) 128 S.W. (2d) 506:

> "As another answer to this proposition, we think the appellees' first counter proposition to the appellant's tenth is sound. It is stated thus: 'The issue of sole proximate cause of an injury as distinguished from a proximate cause simply does not arise when the suit is between the injured party or those in privity with him and the person inflicting the injury, but such an issue can only arise where it is claimed that the act of a third party is a proximate cause.' "

This same view of the idea was again broached in Dodd v. Burkett (Civ. App. 1942) 160 S.W. (2d) 1016:

> "It is our conclusion that the issue of 'sole proximate cause' was with the issue of unavoidable accident, Hicks v. Brown, supra; Orange & N. W. R. Co. v. Harris, 127 Tex. 13, 89 S.W. (2d) 973; Independent Eastern Torpedo Co. v. Carter, Tex. Civ. App., 131 S.W. (2d) 125; Hankamer v. Roberts Undertaking Co., Tex. Civ. App., 139 S. W. (2d) 865, must rest upon proof of some fact independent of the negligence of the parties involved in the wrongful act."

It is now, and was at the time of the trial, petitioner's contention that the submission of this issue would have a harmful and confusing effect to the jury even though it was conditionally submitted. Petitioner recognizes that the conditional submission of issues is authorized but he says this manner of submission ought not to screen a wrongful submission of issues that constitute a harmful and undue emphasis to matters that are not in the case. [fol. 277] When the court refused to submit any issues except those of discovered peril it did so and could have only done so on the theory that respondent's negligence was not a proximate cause of petitioner's injuries or that petitioner's negligence was the sole proximate cause of his own injuries. This being true, such an issue could only have served to give undue emphasis to a matter which the

court already regarded as being out of the case. Whether this court cares to say so or not, harm resulted.

Petitioner still insists that this issue was wrongfully submitted.

Conclusion

WHEREFORE, premises considered, petitioner humbly prays this court to grant this application for a Writ of Error and that such writ issue and that upon final hearing that this cause be reversed and remanded.

Petitioner prays further for general relief.

Respectfully submitted, Webb, Elliott and Rogers, Grayson County State Bank Bldg., Sherman, Texas; O. H. Woodrow, Merchants and Planters National Bank Building, Sherman, Texas, Attorneys for Petitioner, By Ralph Elliott.

Webb, Elliott and Rogers
On the Brief

[fols. 278-279] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 280] IN THE SUPREME COURT OF TEXAS

R. P. HUNTER, *Petitioner*

vs.

TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

ANSWER OF THE RESPONDENT TO PETITIONER'S PETITION FOR WRIT OF ERROR—Filed June 17, 1946

Comes now the respondent, the Texas Electric Railway Company, and files this its answer to Petitioner's application for writ of error, and for same would submit to the Court the following:—

That the petition for writ of error herein should be refused.

[fol. 281] *Statement of the Case*

The Court of Civil Appeals in its opinion correctly stated this case, and the same has been conceded by the Petitioner; and the opinion of the Court of Civil Appeals is therefore adopted for the nature and the result of this suit.

Counter Points of Error

1. The Court did not err in refusing to submit to the jury issues of negligence on the part of the respondent in failing to provide an automatic block signal device in the sector of the collision.

2. The Court did not err in refusing to submit to the jury the issues of negligence on the part of the respondent in employing the system it did for the passage of traffic in the sector of the collision.

3. The Court did not err in refusing to submit to the jury the issues of negligence on the part of the southbound motorman in failing to properly slow down his car before reaching the point of collision.

4. The Court did not err in refusing to submit to the jury the issues of negligence on the part of the southbound motorman in failing to apply his air-brakes as he approached the point of the collision.

[fol. 282] 5. The Court did not err in conditionally submitting Special Issue Number 6, concerning the sole proximate cause, to the jury, over Petitioner's objection.

I

First Counter Point

The first four of Petitioner's points of error are predicated upon the same principle of law; that is, that the Court did not submit his primary negligence issues as set out in his petition for writ of error, and in the opinion of the Court of Civil Appeals; and the same will be answered under one general heading, which is herein referred to as Respondent's first counter point.

Authorities

41 Tex. Sec. 235, pp. 1038, 1039 and 1040;
Garza vs. San Antonio Transit Company, 180 S. W. (2d) 1006 (Error refused);

Atterberry vs. Henwood, 177 S. W. (2d) p. 695 (Error Refused);
Unadilla Valley Ry. Co. vs. Caldine, 73 L. Ed. p. 224 (U. S. Sup. Ct.);
29 Tex. Jur. 197; p. 339;
Southern Ry. Co. vs. Youngblood, 76 L. Ed. p. 1124; (U. S. Sup. Ct.);
Southern Ry. Co. vs. Dantzler, 76 L. Ed. at p. 1127 (U. S. Sup. Ct.);
[fol. 283] *Bishop vs. Texas & Pacific Ry. Co.* 63 S. W. (2d) 247;
Willis vs. Pennsylvania R. R. Co., 122 Fed (2d) p. 248 (Writ of certiorari denied);
62 Sup. Ct. p. 187; (86 L. Ed. p. 547);
Davis vs. Kennedy, 69 L. Ed. p. 212;
Texas Traction Co. vs. Nenny, 178 S. W. 797 (Error Refused);
M-K-T R. R. Co. vs. Rogers, 126 S. W. 613;
Missouri-Kansas-Texas R. R. Co. vs. Johnson, 48 S. W. 568;
Lancaster vs. Jarrett, 258 S. W. 271; also 267 S. W. 518;
Galveston H. & S. A. Ry. Co. vs. Brown, 63 S. W. 305;
Missouri Pacific R. R. Co. vs. Jones, 24 S. W. (2d) 32.

ARGUMENT

The facts in this case disclose, as they are fully set out in the opinion of the Court of Civil Appeals, that R. P. Hunter was an old and trusted employee of the Texas Electric Railway Company; that he had been employed by the company approximately 32 years. He had not only been employed as a motorman, but as an dispatcher an [fol. 284] official of the company. His duties were well known to him. He was employed as the operator of one of the respondent's electric motor cars operating between Denison and Sherman, and in the performance of his duties he was furnished a time card, this being the method of the operation of the respondent's cars or trains.

On May 2, 1944, on his fourth trip of the day, he left Sherman at 2:30 P. M. on schedule time, going north towards Denison. He was operating Train No. 58, which was to meet and wait for and pass Train No. 15, operated

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by Maxwell, at 2:45, at Wood Lake. The time card and rules of the appellee required appellant to wait there for the Maxwell train to pass on the siding, and if the Maxwell train should display a certain signal, showing another section, or extra train, following, to wait until same had passed on the siding before he should proceed. If the Maxwell train, or car, was late, appellant was required under the rule to go to the nearby phone booth of appellee and call the dispatcher for further orders before proceeding.

(See opinion of the Court of Civil Appeals.)

Appellant testified that he reached Wood Lake about on time; that he glanced over his shoulder, and thought he saw Maxwell's car on the siding; that in about half a minute, without looking for any flag that might be displayed, and without phoning the dispatcher, he passed [fol. 285] the meeting point and had proceeded about three quarters of a mile, when he saw the Maxwell car coming around the curve very fast; and a collision occurred at 2:47 P. M.

(See Opinion of the Court of Civil Appeals.)

Appellant testified that when he saw Maxwell's car he brought his car to about a stop; that Maxwell, judging from the action of his car, appeared to have thrown it in reverse, a method of stopping it quickly, and then Maxwell Jumped from the door of his car, which proceeded to the point of the collision, the impact of which crushed the front end of both cars, breaking appellant's leg, and otherwise injuring him, and also injuring a number of passengers. Appellant admitted that he violated the instruction on his time card and the rule of the company in proceeding beyond the meeting point, and as to the cause of the collision appellant testified:

"Q. Now, No. 15 was coming along in a southerly direction. That is where he is supposed to be?

A. Yes, sir.

Q. At that time, you were supposed to be waiting back at Woodlake?

A. Yes, sir.

Q. And you didn't wait for him at Woodlake, as the time card required you to do? A. I didn't, no.

Q. And you passed that meeting point and met him down at the curve? A. Yes.

[fol. 286] • • • •

Q. During all that time you had been following this regular schedule that you outlined to the jury, leaving Sherman at those various times? A. Yes, sir.

Q. This is the only time in six months' period that you failed to stop and wait for No. 15 at Woodlake, or call the dispatcher.

A. That's right.

Q. If you had failed to call the dispatcher or waited at Woodlake prior to May 2nd., you would have had the accident prior to this time? A. Yes, the chances are.

Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake, as the time card and rules required you to, this would not have happened?

A. No.

Q. What caused the accident?

A. Two cars collided.

Q. What caused the two cars to collide?

A. Because they were on single tracks.

Q. Is there any other reason, Mr. Hunter?

A. Because they passed the meeting point.

Q. Who did?

A. I did."

Under the foregoing facts, no excuse was offered by the appellant as to why he violated the instructions on his card and the rule of the appellee.

(See opinion, Court of Civil Appeals.)

[fol. 287] It can readily be seen from the above that this accident happened as a result of Hunter's flagrant violation of the rules in not waiting at the Wood Lake siding, as he should have waited. The time card of instructions was clear, definite, and unequivocative; and he disobeyed all of them.

We therefore respectfully submit that under the aforementioned authorities he was not entitled to these issues: and even so, the jury found that his negligence was the sole proximate cause of his injuries, if any.

To quote from a few of the authorities as above set out we invite the Court's attention to the following excerpt from Texas Jurisprudence, Vol. 29, Sec. 197, p. 339, as follows:

> "To avert collisions, railroad rules usually prohibit a train from proceeding to a depot within a prescribed time after a train may be there according to the train schedule, and require a train that has stopped for any reason between stations, or which, being behind time, reaches a station at which it is scheduled to stop, to send out a signalman to place a flag or light and torpedoes as particularized by the rules. Where these or other like rules are neglected, a recovery may be sustained where the injured trainman was not a party to a violation of the rule. But, except in a case to which the rule of discovered peril applies, one whose injury was due to his own violation of some statute, or of a rule of the company, or who had neglected to comply with a train order or to give necessary [fol. 288] orders to other trainmen, is precluded from recovering — at least, in the absence of some exonerating circumstances. Other fault on the part of the injured trainman is similarly a ground for denying a recovery, provided it is of itself the efficient cause of the injury."

Quoting further, in *Unadilla Valley Railroad Company vs. Caldine*, reported in 73 L. Ed., p. 224, we find an analagous case to this. In connection therewith the Court held as follows:—

> "Harold E. Caldine, an employee on the petitioner's railroad was killed in a collision and his administrator brought this action. The case is within the Federal Employers' Liability Act, and the only question before us is whether the death resulted, in whole or in part, from the negligence of any of the employees of the carrier, within the meaning of the act.
>
> "Caldine was conductor of train No. 2 upon a single track that passed through Bridgewater. He had printed orders that his train was to pass train No. 15 in Bridgewater yard, and that Train No. 15 was to take the siding there to allow No. 2 to pass. The order was

a permanent unless countermanded in writing by the superintendent. Its purpose to prevent a collision was obvious, and there was no excuse for not obeying it. But this time, after reaching Bridgewater, instead of waiting there as his orders required him to do, Caldine directed his train to go on. The consequence was that at a short distance beyond the proper stopping place his train ran into train No. 15, rightly coming the other way, and he was killed. The facts [fol. 289] relied upon to show that the collision was due in part to the negligence of other employees are these: The conductor of No. 15 generally, or when he was a little late in arriving at a station about 2 miles from Bridgewater, would telephone to the station agent at Bridgewater that he was coming. He did so on the day of the collision. The station agent who received the message testified that he told the motorman of No. 2, but the motorman denied it. At all events the deceased, the conductor of No. 2, did not receive the notice. It is argued that the failure to inform the conductor, and the act of the motorman in obeying it, the conductor's order to start, if, as the jury might have found, he knew that train No. 15 was on the way, were negligence to which the injury was due at least in part. It is said that the motorman should have refused to obey the conductor, and should have conformed to the rule, and that his act in physically starting the car was even more immediately connected with the collision than the order of the deceased.

"The phrase of the statute 'resulting in whole or in part' admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In opinion he can not be heard to say that his subordinate ought

not to have done what he ordered. He can not hold the company liable for a disaster that followed dis- [fol. 290] obedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts.

"Still considering the case as between the petitioner and Caldine, it seems to us even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from Train No. 15. A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey. There was some intimation in the argument for the respondent that the rule had been abrogated. The courts below assumed that it was in force, and we see no reason for doubting that their assumption was correct."

In the case of the *Southern Railway Company vs. Youngblood*, by the Supreme Court of the United States, reported in 76 L. Ed., at p. 1124, involving a similar statement of facts to the one in this case the Court said:

> "The case comes to this: that respondent's intestate had clear and definite orders which if obeyed would have avoided the accident and the disobedience whereof was the sole efficient cause of his death."

The above cases were all analyzed by the Circuit Court of Appeals for the Second Circuit in the case of *Willis vs. Pennsylvania Railroad Company*, 122 Fed. (2d.), p. 248; and writ of certiorari was denied on November 10, 1941. See 62 Sup. Ct. 187; 86 L. Ed. 547. Quoting from this [fol. 291] case:

> *"The recent amendment, 45 U. S. C. A., 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee can not recover for injuries resulting solely from his own fault."*

We therefore submit that under the Federal Employer's Liability Act the negligence of Hunter was the sole cause

of his injuries; and even had the issues been submitted, and favorably answered, still he could not recover as a matter of law.

The above is the rule in Texas, as shown by the foregoing excerpt from Texas Jurisprudence.

As said by the Court in the case of *Bishop vs. The Texas & Pacific Railway Company*, 62 S. W. (2d.) 247, (writ of error refused):

> "It is the settled rule that the company can not legally be held liable for the death of an employee, where disobedience of a rule to prevent being exposed to the peril which killed is the sole producing or efficient cause of such death."

The above rule was announced by the Court of Civil Appeals in connection with a case wherein Bishop, the employee, was electrocuted as a result of disobeying a positive rule of the company in climbing up on crossarms which he was forbidden by the rule to do, and was killed. [fol. 292] This rule was followed by the Commission of Appeals in the case of *Missouri Pacific Railroad Company vs. Jones*, 24 S. W. (2d.) 32.

We now invite the Court's attention to the fact that the issues of discovered peril were submitted to the jury, and answered adversely to the contention of the petitioner. Therefore that issue passed out of the case.

Second Counter Point

The Court did not err in the submission of Special Issue No. 6 in answer to Petitioner's Point of error No. 5.

Statement

Special Issue No. 6 was by the Court submitted as follows:

> "If you have answered each of the foregoing issues 'Yes,' then you will not answer the following issue; but if you have answered any of the foregoing issues 'No,' then you will answer the following issue.
>
> "SPECIAL ISSUE NO. 6:
>
> "Do you find from a preponderance of the evidence that the negligence of the plaintiff R. P. Hunter in

failing to await the arrival of the southbound interurban car upon the occasion in question was the sole proximate cause of the injuries, if any, he received.

[fol. 293] "Answer 'Yes' or 'No'.
"Answer....."

Authorities

Texas Rules of Civil Procedure promulgated by the Supreme Court; Rule No. 277.
Maryland Casualty Company vs. Hearks, 188 S. W. (2d.) 262 affirmed by the Supreme Court; 190 S. W. (2d.) page 56.

Argument

The Court conditionally submitted special issue No. 6. This was in keeping with the Rule of Civil Procedure and was not subject to the criticism leveled at is by the appellant Hunter.

In the case of *Maryland Casualty Company vs. Hearks*, 188 S. W. (2d.) 262, affirmed by the Supreme Court; 190 S. W. (2d.) at page 56; also case under the Workman's Compensation Law, and the Court conditionally submitted certain issues in his charge. The same objections and exception were leveled at that method of submission as were leveled by the appellant in this case—that the issue as couched and framed would likely mislead the jury. In connection therewith the Court said:

> "By its sixteenth point, the appellant complains of the action of the trial court in the wording of the special issues contained in the charge in conditioning [fol. 294] the submission of the issues on an affirmative answer to the immediate preceding issue. It says that this amounted to a suggestion by the court to the jury that the previous preceding issues likely would be, had been, or should be answered 'Yes'. The appellant in its brief suggests that this court should disapprove this type of submission of issues and declare that the court rules which require a fair and separate submission of issues 'is no mere rigmarole.' "

Prior to the adoption of the new rules and recent decisions, there might have been some merit in the contention of the appellant; however, this has been foreclosed to him.

Wherefore, Respondent prays that Petitioner's petition for writ of error be refused.

Freeman, Wolfe & Keith, Sherman, Texas, Gullett & Gullett, Denison, Texas, Attorneys for the Respondent. By Alexander Gullett, Of Counsel.

[fol. 295] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 296-297] IN THE SUPREME COURT OF TEXAS

June 26th, 1946.

R. P. HUNTER

vs.

TEXAS ELECTRIC RY. CO.

From Grayson County. 3rd Dist.

ORDER REFUSING WRIT OF ERROR—June 26, 1946

This day came on to be heard the application of Petitioner for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that the application be refused; that applicant, R. P. Hunter, pay all costs incurred on this application.

Clerk's Certificate to foregoing paper omitted in printing.

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[fol. 298] IN THE SUPREME COURT OF THE STATE OF TEXAS

[Title omitted]

MOTION FOR REHEARING ON ORDER REFUSING PETITIONER'S APPLICATION FOR WRIT OF ERROR—Filed July 11, 1946

To the Supreme Court of the State of Texas:

Now comes the petitioner in the above numbered and entitled cause, and respectfully moves the Court to set aside the order of this Court, entered on the 26th day of June, 1946 refusing Petitioner's Application for Writ of Error and to grant him a hearing, and to reverse and remand said cause, and therefor says:

[fol. 299]

I.

That the Court of Civil Appeals erred in overruling assignments of error Numbers 2 and 8 (Tr. pages 50, 51), thereby holding in effect that Petitioner's pleadings and evidence did not raise jury issues, and thereby holding in effect that there was no evidence to support said issues, on the following act of negligence as a proximate cause of the collision:

1. That the Respondent was negligent in failing to provide an automatic block signal device in the sector of the collision.

II.

That the Court of Civil Appeals erred in overruling assignments of error Numbers 3 and 9 (Tr. pages 50, 51), thereby holding in effect that Petitioner's pleadings and evidence did not raise jury issues, and thereby holding in effect that there was no evidence to support said issues, on the following act of negligence as a proximate cause of the collision:

1. That the Respondent was negligent in employing the system it did for the passage of traffic in the sector of the collision.

III.

That the Court of Civil Appeals erred in overruling assignment of error Number 14, thereby holding in effect that the submission of the issue of sole proximate cause

was not calculated to confuse or mislead the jury, and was not improperly embodied in the charge, even though petitioner had been denied submission of all the issues of [fol. 300] primary negligence raised by the pleading and the evidence.

IV.

That the Court of Civil Appeals erred in overruling assignments of error Numbers 7 and 13, thereby holding in effect that Petitioner's pleadings and evidence did not raise jury issues, and thereby holding in effect that there was no evidence to support said issues on the following act of negligence as a proximate cause of the collision:

1. That the Respondent was negligent in that the south bound motorman failed to properly slow down his car before reaching the point of collision.

V.

That the Court of Civil Appeals erred in overruling assignments of error Numbers 4 and 10, thereby holding in effect that Petitioner's pleadings and evidence did not raise jury issues, and thereby holding in effect that there was no evidence to support said issues, on the following act of negligence as a proximate cause of the collision:

1. That the Respondent was negligent in that the south bound motorman failed to apply his air brakes as he approached the point of collision.

[fol. 301] Wherefore, premises considered, Petitioner prays that this Court set aside the order entered on the 26th day of June, 1946, refusing Petitioner's Application for Writ of Error, and that it grant him a rehearing; that his Application for Writ of Error be granted; and that, upon final hearing, the judgment of the Court of Civil Appeals be reversed, and that this cause in all things be reversed and remanded.

He prays further for all other relief, general and special, to which he may be in law and in equity entitled.

Attorneys of record for Respondent are Freeman, Wolfe & Keith, with offices located in Sherman, Grayson County, Texas; and Gullett & Gullett, with offices located in Denison, Grayson County, Texas. Mr. Joe Keith, of Freeman, Wolfe & Keith, has been delivered a copy of this motion for re-

hearing; and Mr. Alexander Gullett, of Gullett & Gullett, has been delivered a copy of this motion for rehearing.

O. H. Woodrow, Sherman Texas, Webb, Elliott & Rogers, Sherman, Texas, By: F. Neilson Rogers, Attorneys for Petitioner.

[fol. 302] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 303] IN THE SUPREME COURT OF THE STATE OF TEXAS

[Title omitted]

ANSWER OF THE RESPONDENT TO PETITIONER'S MOTION FOR REHEARING ON ORDER REFUSING PETITIONER'S APPLICATION FOR WRIT OF ERROR—Filed July 16, 1946

To the Supreme Court of the State of Texas:

Comes now the respondent in the above entitled and numbered cause and files this its Answer To Petitioner's Motion For Rehearing On Order Refusing Petitioner's Application for Writ of Error, and would respectfully show to the Court as follows:

The Court is respectfully referred to the Respondent's Answer to Petitioner's Petition for Writ of Error in which the propositions advanced by the petitioner are as concisely answered as is possible for the same to be answered.

In Paragraphs One, Two and Four and Five, the petitioner states that the Court of Civil Appeals erred in holding that petitioner's pleadings and evidence did not raise jury issues and in answer to these we quote from the opinion of the Court of Civil Appeals as follows:

"It is true that appellant alleged that appellee railway company was negligent in the three respects stated, and that each of such acts constituted negligence and a proximate cause of his injury, but under his foregoing testimony his own disobedience of the time card instruction and the rules of appellee caused the collision and injury to himself. In consequence neither the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, nor of Art. 6440

of the Revised Statutes of Texas have any application to the instant case. These statutes require the injured employee to allege and prove that his employer was negligent and that such negligence was the proximate cause in whole or in part of the injury sustained by him. Such statutes have no application where the violation of a train order or rule is by the employee and the disobedience whereof was the sole efficient cause of the accident."

In Pararaph Three the conditional submission of the issue of sole proximate cause is again attacked and in answer thereto the Respondent respectfully refers the [fol. 304] Court to the following authority:

Maryland Casualty Company vs. Hearks 188 SW 2nd 262, affirmed by the Supreme Court, 190 SW 2nd Page 56.

The Respondent therefore respectfully submits that the Petitioner's Motion For Rehearing should be in all things overruled.

Freeman, Wolfe & Keith, Sherman, Texas, Gullett & Gullett, Denison, Texas, By Alexander Gullett, Of Counsel.

The attorneys representing the petitioner are Messrs. Webb, Elliott & Rogers and Mr. O. H. Woodrow, Sherman, Texas, who have been furnished a copy of this Answer.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 305-309] IN THE SUPREME COURT OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—Oct. 16, 1946

The motion for rehearing herein filed by the Petitioner, having heretofore been submitted to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 310] IN THE SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1947

No. 893

R. P. HUNTER, *Petitioner*

vs.

TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

STIPULATION AS TO RECORD

It is stipulated and agreed by and between F. Neilson Rogers, counsel for petitioner, and Joseph A. Keith, counsel for respondent, that, in order to save expense in the printing of the record herein, the following portions of the record, the same being sufficient to show the errors complained of, shall be printed, and no more, to-wit:

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It is further stipulated and agreed that, if from oversight or omission, any necessary part of the record be not thus printed, petitioner has the right to print, or may be required by respondent to print, any further or additional portions thereof.

Dated 3 January 1946.

F. Neilson Rogers, Grayson County State Bank Bldg., Sherman, Texas, Counsel for Petitioner.

Joseph A. Keith, M. & P. National Bank Bldg., Sherman, Texas, Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 893

R. P. HUNTER,

Petitioner,

vs.

TEXAS ELECTRIC RAILWAY COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN, TEXAS.

To the Honorable Supreme Court of the United States:

R. P. Hunter, petitioner, prays that a Writ of Certiorari be issued to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas (the highest Court of the State of Texas in which decision could be had), affirming the judgment of the Fifteenth Judicial District Court of Grayson County, Texas, which denied petitioner a recovery under the Federal Employers' Liability Act.

Summary and Short Statement of the Matter Involved

Petitioner brought this suit under the provisions of the Federal Employers' Liability Act to recover damages for

personal injuries sustained in a head-on collision between two of respondent's railway cars on May 2, 1946, while engaged in interstate commerce.

Respondent's railway line runs from Denison, Texas, located on Red River, the State line between Texas and Oklahoma, through Sherman, Texas, a neighboring city, and ends at Waco, Texas, located in central Texas (R. 89). That portion of the railway line running from Denison, Texas, to Sherman, Texas, is a single track, and passes through a wooded lake area known as Woodlake, located about midway between the two cities of Sherman and Denison.

For a complete picture of respondent's operations, see *Texas Electric Railway Co.* v. *Eastus*, 25 Fed. Supp. 825, affd. 308 U. S. 512, 84 L. Ed. 436, 60 Sup. Ct. 134.

The collision occurred about three quarters of a mile north of Woodlake between a car piloted by petitioner, R. P. Hunter, bound from Sherman north to Denison, and a railway car operated by one Maxwell, bound from Denison south toward Sherman.

The railway cars at certain times met at Woodlake where the southbound train took siding and permitted the northbound train, driven by petitioner, to proceed north on the main line to Denison, Texas. Petitioner arrived at the Woodlake "meet point" before the arrival of the southbound train. Petitioner stopped and ascertained what he took to be the presence of the southbound car on the siding, and then proceeded ahead upon the main line (R. 45, 82). Without warning by an automatic block signal device that the main line ahead was in fact occupied, petitioner proceeded ahead upon the main line to a point where the two cars both came within view of each other (R. 46-7, 77-8). Petitioner brought his train to a stop (R. 47). The southbound operator, travelling at a high rate of speed, threw his

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car in reverse and jumped from his train, which proceeded to the point of collision, inflicting serious and permanent bodily injuries upon petitioner (R. 47, 48).

There was appropriate pleading and ample proof that an automatic block signal device formerly maintained at Woodlake, but removed some years before by respondent, would have prevented the collision in question if it had been in operation (R. 2, 82, 73, 77). There was further pleading and proof incident thereto that in the "early thirties" respondent had reduced its train crews upon each car and placed the duties formerly performed by two men upon petitioner (R. 72, 73). It was further shown that respondent still compelled petitioner to perform the duties of two men at the time of the collision, although the traffic operations had increased ten-fold (R. 81).

Petitioner further contended that the southbound car was improperly operated immediately prior to the collision (R. 3).

During the course of the trial, respondent was permitted to file amended pleadings alleging that petitioner had assumed the risk of his employment at the time of the collision (R. 9, 100). Petitioner properly requested that the foregoing questions of primary negligence on the part of the carrier be submitted to the jury for determination (R. 12-19). The trial court denied petitioner's request and refused to submit any question of negligence on the part of the carrier to the jury for determination. The court permitted the jury to pass only on question of discovered peril and sole proximate cause (R. 28, 29).

Deprived of a trial by jury upon the questions of the carrier's negligence, and contending that such deprivation, in effect, forced him to assume the risks of his employment, petitioner appealed.

The Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, Texas, affirmed the judg-

ment of the trial court (R. 147). In its written opinion that affirmed the judgment of the trial court, it likewise denied petitioner a jury trial upon the issues of the carrier's negligence, holding that petitioner was concluded by the "primary duty rule," forcing him in effect to assume the risks of his master's negligence and holding further that the Federal Employers' Liability Act was inapplicable in "primary duty rule" cases. The enlightening language of that opinion is here quoted:

> "It is true that appellant alleged that appellee railway company was negligent in the three respects stated, and that each of such acts constituted negligence and the proximate cause of his injury, but under his foregoing testimony his own disobedience of the time card instruction and the rules of appellee caused the collision and injury to himself. In consequence, neither the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. Sect. 51, nor of Art. 6440, Revised Statutes of Texas, have any application to the instant case."

Petitioner moved for a rehearing in the Court of Civil Appeals, which was overruled (R. 156). He made application for Writ of Error to the Supreme Court of Texas (R. 157). This application was refused by the Supreme Court of Texas with no notation (R. 178). Petitioner filed a Motion for Rehearing of his Application for Writ of Error R. 179) . This motion for rehearing was overruled by the Supreme Court of Texas on October 16, 1946 (R. 182). Thereby, the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, became a final judgment rendered by the highest court of Texas in which a decision could be had. (*Sullivan* v. *Texas,* 207 U. S. 416, 52 L. Ed. 275, 28 Sup. Ct. 215; *Bacon* v. *Texas,* 163 U. S. 207, 41 L. Ed. 133, 16 Sup. Ct. 1023; *St. Louis, San Francisco & Texas Railway Co.* v. *Seal,* 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129; *San Antonio*

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& Aransas Pass Railway Co. v. *Wagner*, 241 U. S. 475, 60 L. Ed. 1111, 36 Sup. Ct. 626.)

Basis of Jurisdiction

A. The jurisdiction of this Court is based upon paragraph (b) of Section 344, Title 28 of the Judicial Code as amended, 28 U. S. C. A. 344.

B. The nature of the case and the erroneous construction placed upon the Federal Employers' Liability Act by the State Court is brought within the jurisdictional indications of paragraph (a) of Section 5, Rule 38, of the Revised Rules of the Supreme Court of the United States, which provides that this Honorable Court may review, on Writ of Certiorari, "(a) where a state court has decided a federal question of substance . . . in a 'way probably not in accord with the applicable decisions of this Court.'"

C. The Judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, became final on November 1, 1946, which was fifteen days after the Supreme Court of Texas overruled petitioner's Motion for Rehearing of his application for Writ of Error (R. 182), and this application, the pleadings, record and supporting brief are being filed in this Honorable Court well within three months after the entry of such judgment.

Questions Presented

1. Whether a railroad employee held to be contributorily negligent as a matter of law, through violation of a company rule, and denied a trial by jury upon issues of negligence of a carrier engaged in interstate commerce being amply pleaded and proven, was thereby forced to assume the risks of his employment in direct disregard of Section 54 of the Federal Employers' Liability Act (45 U. S. C. A. 54) as amended by Act of August 11, 1939.

2. Whether State court holding that railroad employee was guilty of contributory negligence as a matter of law, through violation of a company rule, and denying a trial by jury of issues amply pleaded and proven of negligence on the part of carrier engaged in interstate commerce, thereby forcing employee to assume risks of his employment, was in contravention of the applicable holding of the Supreme Court of the United States in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54.

Reasons Relied On for Allowance of the Writ

I. The opinion and decision of the Court of Civil Appeals holding petitioner employee of railroad engaged in interstate commerce guilty of contributory negligence as a matter of law because of violation of a company rule and denying petitioner railroad employee a trial by jury upon issues of negligence on the part of the carrier which were both amply pleaded and proven thereby forced petitioner railroad employee to assume the risks of his employment through application of "the primary duty rule" was in direct contravention of the latest expression of the Supreme Court of the United States in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54.

II. If this Court permits the Court of Civil Appeals for the Third Supreme Judicial District of Texas to hold in a written opinion that a railway employee violating a company rule will be denied the right to have a jury pass upon the question of the carrier's negligence, thereby forcing the employee to assume the risks of such carrier's negligence as a matter of law, then the far reaching holding in *Tiller* v. *Atlantic Coast Line R. Company*, 318 U. S. 54, will be effectually nullified, at least in Texas.

III. If this Court permits the Court of Civil Appeals for the Third Supreme Judicial District of Texas to hold in

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written opinion that petitioner railway employee of carrier engaged in interstate commerce can be deprived of a jury trial upon carrier's negligence or preclude judgment recovery because of violation of a company rule, and to go still further and hold that the Federal Employers' Liability Act has no application in a "primary duty rule" case, then the whole fabric of the Federal Employers' Liability Act has been rent and torn asunder.

IV. The essential question presented in this case is deemed to be of such importance as to justify review by this Court. Unless reviewed the decision of the Court below is likely to have an unsettling influence upon the whole structure of the Federal Employers' Liability Act and a demoralizing influence upon railway employees injured by reason of the carrier's negligence where a violation of a company rule is involved. This case, it is submitted, calls for a reaffirmation by this Court that no case is to be withheld from a jury on any question of assumption of risk, and that assumption of risk must not, contrary to the will of Congress, be allowed recrudescence, under any other label in the common law lexicon.

Conclusion

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

WEBB, ELLIOTT AND ROGERS,
Grayson County State Bank Bldg.,
Sherman, Texas,

By J. NEILSON ROGERS,
Attorneys for Petitioner,
R. P. Hunter.

APPENDIX AND SPECIFICATION OF ERRORS

The following points of error were assigned in the courts below as the same point of error, and are specifically brought forward and made a part of this petition:

Point Number One

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision. (Germane to ground No. 1.)

Point Number Two

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in employing the system it did for the passage of traffic in the sector of the collision. (Germane to ground No. 2.)

Point Number Three

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman, in failing to properly slow down his car before reaching the point of collision. (Germane to ground No. 3.)

Point Number Four

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision. (Germane to ground No. 4.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 893

R. P. HUNTER,

Petitioner,

vs.

TEXAS ELECTRIC RAILWAY COMPANY,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, (R. 147), is reported in 194 S. W. (2) 281.

Ground of Jurisdiction

A statement of the basis of the jurisdiction of this Court is contained in the foregoing petition, and for brevity is here adopted and not repeated.

Concise Statement of the Case

The essential facts of the case are stated in the foregoing petition, and for brevity are adopted and not repeated here.

Specification of Errors

The errors to be urged are set forth in the Appendix to the petition, and for brevity are adopted and not repeated here.

POINTS PRESENTED AND ARGUMENT

Summary of Argument

I. There was error in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision.

A. The error in refusing to allow a jury to determine issues of primary negligence on the part of the carrier remains in the case and cannot be affected by adverse findings upon discovered peril.

B. The question of the carrier's negligence in failing to provide an automatic block signal device in the sector of the collision was sufficiently pleaded and overwhelmingly established by the evidence.

1. The petitioner's trial pleading fully pleaded the question of negligence on the part of the carrier in this regard, and such pleadings were conceded by the Court of Civil Appeals to be sufficient.

2. The evidence is undisputed and overwhelming that if the carrier had retained the automatic block signal device in the sector of the collision as it had formerly done, the collision in question would have been averted.

C. The holding of the Court of Civil Appeals that the failure of the carrier to maintain an automatic block signal device in the sector of the collision was not negligence and not a proximate cause, as a matter of law, was an attempt to deprive petitioner of a right to trial by jury, and an attempt to insulate the carrier

from liability by effectually forcing petitioner to assume the risks of his employment.

1. The names and labels used in the veil of logic constructed will not be allowed to screen the carrier from liability for its negligence by forcing the employee to assume the risks of his employment as an effect.

2. The once fashionable logic resorted to in the "primary duty rule" cases now stands in true and naked form as assumption of risk, and cannot now be resurrected in direct defiance to the will of Congress.

II. There was error in refusing to submit to the jury issues of negligence on the part of the respondent in employing the system it did for the passage of traffic in the sector of the collision.

A. Petitioner's right to the submission of this issue of primary negligence is unaffected by discovered peril.

B. The question of the carrier's negligence in employing the system it did in the sector of the collision was sufficiently pleaded, and was supported by sufficient evidence to support the jury's verdict.

1. The petitioner's trial pleading fully pleaded the question of negligence on the part of carrier. In this regard such pleading was conceded by the Court of Civil Appeals to be sufficient.

2. The overwhelming evidence disclosed that after a reduction of train personnel during the depression era, respondent by failing to restore sufficient personnel to man the trains had permitted increased traffic to gradually and stealthily impose a negligent system for the passage of traffic in the sector of the collision.

C. The holding of the Court of Civil Appeals that the system employed by the carrier for the passage of traffic in the sector of the collision, in view of the under-

manned trains and the increased traffic burdens, was not negligence and not a proximate cause, as a matter of law was an attempt to deprive petitioner of his right to a trial by jury, and an attempt to insulate carrier from liability by effectually forcing petitioner to assume the risks of his employment.

1. The petitioner's trial pleading fully pleaded the question of negligence on the part of the carrier in this regard, and such pleadings were conceded by the Court of Civil Appeals to be sufficient.

2. The evidence is undisputed and overwhelming that, if the carrier had retained the automatic block signal device in the sector of the collision as it had formerly done, the collision in question would have been averted.

III. There was error in refusing to submit to the jury issues of negligence on the part of respondent's southbound motorman in failing to properly slow down his car, or make proper application of his brakes as he approached the point of collision.

A. There was requisite pleading and proof to authorize submission of these issues.

1. The pleading was sufficient.

2. The evidence disclosed that the southbound motorman had his car wide open, and was driving it as fast as it would go on a straight-away track going into the curve on which the collision occurred. Petitioner contended that respondent, on testifying, presented sufficient facts from which a jury could have properly inferred negligence.

B. The holding of the Court of Civil Appeals that the failure of the respondent's southbound motorman to properly slow down his car or make proper application of his brakes, and going into the curve where the collision occurred with his car wide open and going as fast as he could make it go, was not negligence and not a proximate cause of the collision as a matter of law,

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was an attempt to deprive petitioner of his right to a trial by jury, and an attempt to insulate the carrier from liability by effectually forcing the petitioner to assume the risks of his employment.

Point Number One

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision.

Argument under Point Number One

Petitioner contends that he was denied a trial by jury upon the submissible issues of liability against respondent. His contention in this regard cannot now be affected by contained findings upon issues of discovered peril. *Hines* v. *Foreman*, 243 S. W. 479; *Dallas Railway Term. Co.* v. *Bankston*, 51 S. W. (2d) 304.

In its opinion, the Court of Civil Appeals conceded that the allegations of initial liability against respondent were sufficient. However, because of the view it entertained and of the ultimate disposition made of the case, the Court of Civil Appeals completely pretermitted any discussion or statement of petitioner's testimony that so forcefully necessitated the submission of negligence and causation issues against respondent. But such judicial casuistry cannot be indulged in here. Listen to the testimony as it came from the lips of the witness:

> "A block signal system would have stopped me when a time card did not, because there would have been a red light (R. 82). An automatic block signal is an automatic light set-up, showing red—it would have shown red in my face of the other fellow coming. Between Woodlake and Denison they used to have automatic block signals installed (R. 82). They used to have that red signal to stop if there was danger between

Woodlake and Denison (R. 73). *If they had retained the safety devices they had then with the red signal showing the road was not clear ahead, I would have had a warning and would have stopped"* (R. 77-8). (Italics ours.)

This testimony alone, and in conjunction with other testimony in the record, with forceful and compelling clarity, raised the issues against respondent and commanded their submission.

These safety devices are in common use by railroads for the averting of accidents under these conditions. The evidence is uncontradicted that such safety devices for the protection of petitioner and others and for the prevention of identical and similar accidents were once installed and since removed, and if they had not been removed would have avoided this collision. In any event it was a question for the trier of fact. In *Eglsaer* v. *Scandrett* (C. C. A. 7th, 1945) 151 Fed. (2d) 562, the Court said:

> " 'Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a combination of any of these factors, but after logic has thus determined the causal basis of the injury the statute steps in to say that if among these causes there is negligence on the part of the employer as that term is understood in the act, liability of the employer shall follow irrespective of the other factors causally related in whole or in part from negligence even if the negligence of the injured employee or some other factor was logically nearer to or more influential in producing that injury. * * * *These words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases.* * * * These words suggest that there may be a plurality of causes each of which is sufficient to permit a jury to assess liability.' " (Italics ours.)

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In *Bailey* v. *Central Vermont R. Co.* (U. S. Sup. Ct. 1943), 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062, the Court said:

> "The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence', Jacobs *v.* N. Y., 315 U. S. 752, 86 L. Ed. 1166, 62 Sup. Ct. 854. • • • It is a part and parcel of the remedy afforded railway workers under the Employers' Liability Act. • • • Reasonable care and cause and effect are as illusive here as in other fields, but the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. • • • *To deprive these workers of the benefit of a trial by jury in close or doubtful cases is to take away a goodly portion of the relief Congress has afforded them.*" (Italics ours.)

The Court of Civil Appeals concluded as a matter of law that the failure to install an automatic block signal device was non-negligence because "• • • the evidence showed that if a block signal system had been installed it would have added nothing to positive time card instructions of appellee • • •." Or if it was negligence, then it was not actionable negligence—it not being a proximate cause.

Regardless of the name attached or the rigors of reason that brought it forth—regardless of what artifice of logic was utilized in evading the submission of these issues and depriving petitioner of his right to a trial by jury—the result and the effect is the same. It is assumption of risk—pure and simple—artfully arrived at by devious reasoning. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A. L. R. 967. *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 1683, 63 Sup. Ct. 1271. *Stoffel* v. *McCahan Sugar Refining & Molasses Co.*, 35 Fed. (2d) 602. *Schlemmer* v. *Buffalo, Rochester and Pittsburg R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407.

It is obvious that the trial court and respondent's counsel were proceeding upon this misguided theory when there was filed and permitted to be filed the following trial amendment in the middle of the trial:

> "That the injury received by the plaintiff herein on the occasion in question, if any, resulted solely from a risk he assumed incident to, in the furtherance of, and connected with his employment with the defendant" (9, 100).

This is a "primary duty rule" case. In its fundamental aspect, no attempt has been made to "look at the situation as a practical unit rather than inquire into a purely logical priority." *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 Sup. Ct. 318. If any searching analysis had been made it would have been apparent that the theory and effect of the disposition of this case was in direct defiance of the will of Congress. 45 U. S. C. A. 695, Title 45, Sect. 54 as amended, 10-A F. C. A. 139, Title 45, Sect. 54 as amended.

We quote from *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A. L. R. 907:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment and Congress by abolishing the defense of assumption of risk in that statute did not mean to leave open the identical defense of the master by changing the name to 'non-negligence.' "

It is apparent that the trial court, and particularly the Court of Civil Appeals, seized upon *Davis* v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 Sup. Ct. 33; *Unadilla Valley R. Co.* v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224, 49 Sup. Ct. 91; and the other "primary duty rule" cases, and in the instant case forced an effect here that resulted in those cases.

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It is also clear that application of the "primary duty rule" has been made here in which the contributory negligence of Hunter through violation of a company rule has become assumption of risk. This is no longer the law.

It is not here contended that Hunter may not have been found guilty of contributory negligence of violating a rule of the company which it was his primary duty to obey. It is simply contended that in doing so he did not assume the risk of his master's negligence and that he was entitled to a submission of these negligence issues.

In *Spokane & Inland Empire R. Co.* v. *Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 1135, 36 Sup. Ct. 683, in commenting upon the negligence involved in a main line collision by reason of the violation of an order, this Court said:

> "From the fact that he disregarded and in effect violated the order as actually communicated to him, it, of course, does not necessarily follow that he did this wilfully. *The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence* on his part, and not a departure from the course of his employment." (Italics ours.)

The principle of law enunciated in *McCarthy* v. *Pennsylvania R. Co.*, 156 Fed. (2d) 877, although involving a Safety Appliance Act violation, is applicable here.

The cases relied on by respondent and the Court of Civil Appeals have been named and overruled by the Supreme Court of the United States.

Quoting again from *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 ALR 967:

> "Aside from the difficulty of distinguishing between contributory negligence and assumption of risk, many other problems arose. *One of these was the application of the 'primary duty rule' in which contributory negligence through the violation of a company rule became assumption of risk. Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 73 L. Ed. 224, 49 Sup. Ct. 91; Davis v. Kennedy, 266 U. S. 147, 69 L. Ed. 212, 45 Sup. Ct. 33.* • • • • *It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called.* • • • • The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all of its various forms of contributory negligence, the fellow servant rule and assumption of risk, must not contrary to the will of Congress be allowed recrudescence under any other label in the common law lexicon. • • • • *No case is to be withheld from a jury on any theory of assumption of risk, and questions of negligence under proper charge from the court should be submitted to the jury for their determination.*" (Italics ours.)

The opinion of the Court of Civil Appeals reveals that it could have labored under no greater misapprehension of the law than it did. The Court of Civil Appeals by its opinion attempted to re-write into the Employers' Liability Act an exception that Congress in clear, unmistakable language wrote out of it. Congress did not say that certain risks would be assumed in the event of violation of a primary duty. Instead, it obliterated every vestige of assumed risk. The spectre of that narrow illiberal, judicial

reasoning that has scored the railroad worker these many years has again reared its ugly head.

Petitioner earnestly insists that the opinion of the Court of Civil Appeals wholly, incorrectly and wrongfully states the law of this case, and he earnestly insists that he was denied the right of trial by jury in the refusal to submit his liability issues against respondent.

Point Number Two

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in employing the system it did for the passage of traffic in the sector of the collision.

Argument under Point No. Two

It is necessary to quote pertinent portions of petitioner's testimony:

> "Right below the motorman's window is a train number box which is the number of your train. On this occasion I looked over my shoulder and thought I saw the man there. I did not definitely ascertain whether he was train 15 or whether he was carrying any signals. I didn't ascertain that that man had classification signals or car classification (R. 58-59). I went by there and I thought I saw him over there. It could have been an extra in there. I stopped there and waited there a half a minute and looked over my shoulders and said, 'There he is'. He didn't blow any signal. He was supposed to if he was carrying a green flag. (R. 81-2). My visibility was good that day. There was nothing to obstruct my view from seeing the car until I got to the stop. I did not see the man when I got to the pass. Then I got down there and looked over my shoulder. I had passed the telephone booth then and it appeared that it was a place there by the interurban. (R. 82)"

It further appears from petitioner's testimony, in substance, that respondent's cars were formerly manned by a conductor and a motorman, but that during the depression years of the early 'thirties' the conductor was removed and his duties assumed by the motorman. (R. 45). His duties consisted in operating the car, reading the time card, making meeting points, identifying the cars, collecting fares, making out duplicate cash fare receipts, issuing the passenger a duplicate receipt, making change, fixing the trolley, and doing everything there was to do (R. 72, 73). All of these duties had been performed by Hunter for approximately ten years prior to the collision but under different circumstances. The volume of passengers and traffic at the time of the collision had increased ten-fold since the time the conductor had been removed (R. 81).

It is clear from the foregoing testimony that respondent, during the bleak, poverty-stricken years of the early 'thirties' had retrenched its operating expenses by reducing its personnel and placing upon the shoulders of petitioner the multiplied responsibilities and duties of more than one man. It no longer left the motorman free to devote his exclusive attention to the operation of the car. But with the return of fruitful years and inordinate transportation burdens—while this nation writhed in the throes of an unparalleled transportation crisis—respondent railway, growing sleek and thoughtless, while its transportation and revenues mounted ten-fold, did not see fit to place conductors again upon its cars and lighten the burden of those situated as was petitioner. Instead, it chose to permit time and changing conditions to create a negligent and dangerous system for the passage of traffic in the Woodlake sector that finally resulted in the collision.

It is submitted that the conclusion created and inference to be drawn from the foregoing testimony is that there was another car, possibly an extra, at or near the Woodlake

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passing track which petitioner, looking over his shoulder, concluded to be train number 15. It developed that the car concluded to be number 15 was not in fact number 15. Proceeding further with this conclusion, the most that could be said was that Hunter's negligence consisted in failing to identify the car he thought he saw as number 15. It further appears from the testimony that the method of identification of a particular train was by the numbers contained in the train number box. It does not appear that the car, possibly an extra, which Hunter contended he took to be number 15, had any numbers in the train number box, or if it did, what those numbers were. There is no testimony showing that the train box numbers, if there were any, were visible to Hunter under the conditions and circumstances prevailing at the Woodlake sector. Hunter knew he was to meet number 15 at Woodlake. The time card instruction added nothing to his knowledge.

It is contended that the method of providing identification by numbers alone, in the light of all the multiplied and additional duties that had been vested upon petitioner and not removed, although traffic had increased ten-fold, was negligence. It is an inference and a conclusion that a jury would have been warranted in drawing. The Court of Civil Appeals entirely misunderstood the contention here made.

Petitioner submits that this was an issuable fact of negligence which he was entitled to have submitted to the jury and that error was committed in not so doing. The effect of the holding of the trial court and the Court of Civil Appeals is to compel petitioner to assume the risk of this negligence. Petitioner here adopts in support of this contention the argument advanced under his First Point of Error.

Point Number Three

The error of the court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to properly slow down his car before reaching the point of collision.

Point Number Four

The error of the court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failure to apply his air brakes as he approached the point of collision.

Argument under Points Numbers Three and Four

The third and fourth points of error are germane to each other and can be properly covered together.

These issues were raised by the testimony of Maxwell, the southbound motorman, which, in substance, is materially as follows:

> "I was driving as fast as the car would go (R. 128). I wouldn't swear how fast they would go because they have no speedometers. But I had it wide open. I was on a straight-away track when I saw him and I had it wide open. When I saw Mr. Hunter's car I was on a straight-away track just prior to the time I reached the curve. I had it wide open—the car was going just as fast as I could make it go" (R. 129).

It is evident that the southbound motorman was on a straight-away track with his car wide open. It was going as fast as it was possible to make it go. This was on a straight-away track going into a curve. It was certainly testimony from which a jury may have concluded that the southbound motorman was failing to use the care that an ordinarily prudent person would have used under the same

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or similar circumstances. It is not sufficient to contend that Hunter's presence could not have been foreseen. The presence of someone rightfully upon the track could have been foreseen. It might have been a section crew. It might have been a hand-car. It might have been a stalled car. It might have been any combination of things. It was certainly an issuable fact for a jury to say whether or not these acts set out in the foregoing testimony were negligence. The effect of the holding of the trial court and of the Court of Civil Appeals has visited upon this petitioner and forced him to assume the risk of these acts of negligence on the part of the southbound motorman. In support of this argument, petitioner here adopts the argument advanced under his First Point of Error.

Conclusion

WHEREFORE, petitioner respectfully prays that this Honorable Court issue its writ of certiorari, so that on final hearing hereof judgment of the State Courts in this case may be reversed, to the end that uniformity may prevail, and that justice may be done.

Respectfully submitted,

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Grayson County State Bank Bldg.,
Sherman, Texas,
By F. NEILSON ROGERS,
Counsel for Petitioner;
R. P. HUNTER.

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IN THE

Supreme Court of the United States

October Term, 1947

No. 18

R. P. HUNTER, *Petitioner*

vs.

TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

BRIEF OF PETITIONER ON WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

OPINION OF THE COURT BELOW

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, (R. 147), is reported in 194 S.W. (2) 281.

GROUNDS OF JURISDICTION

A. The jurisdiction of this Court is based upon paragraph (b) of Section 344, Title 28 of the Judicial Code as amended, 28 U.S.C.A. 344.

B. The nature of the case and the erroneous construction placed upon the Federal Employers' Liability Act by the State Court is brought within the jurisdictional indications of paragraph (a) of Section 5, Rule 38, of the Revised Rules of the Supreme Court of the United States, which provides that this Honorable Court may review, on Writ of Certiorari, "(a) where a state court has decided a federal question of substance . . . in a 'way probably not in accord with the applicable decisions of this Court.' "

CONCISE STATEMENT OF THE CASE

Petitioner brought this suit under the provisions of the Federal Employers' Liability Act to recover damages for personal injuries sustained in a head-on collision between two of respondent's railway cars on May 2, 1946, while engaged in interstate commerce.

Respondent's railway line runs from Denison, Texas, located on Red River, the State line between Texas and Oklahoma, through Sherman, Texas, a neighboring city, and ends at Waco, Texas, located in central Texas (R. 89). That portion of the railway line running from Denison, Texas, to Sherman, Texas, is a single track, and passes

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through a wooded lake area known as Woodlake, located about midway between the two cities of Sherman and Denison.

For a complete picture of respondent's operations, see Texas Electric Railway Co. v. Eastus, 25 Fed. Supp., 825, affd. 308 U.S. 512, 84 L. Ed. 436, 60 Sup. Ct. 134.

The collision occurred about three quarters of a mile north of Woodlake between a car piloted by petitioner, R. P. Hunter, bound from Sherman north to Denison, and a railway car operated by one Maxwell, bound from Denison south toward Sherman.

The railway cars at certain times met at Woodlake where the southbound train took siding and permitted the northbound train, driven by petitioner, to proceed north on the main line to Denison, Texas. Petitioner arrived at the Woodlake "meet point" before the arrival of the southbound train. Petitioner stopped and ascertained what he took to be the presence of the southbound car on the siding, and then proceeded ahead upon the main line (R. 45, 82). Without warning by an automatic block signal device that the main line ahead was in fact occupied, petitioner proceeded ahead upon the main line to a point where the two cars both came within view of each other (R. 46-7, 77-8). Petitioner brought his train to a stop (R. 47). The southbound operator, travelling at a high rate of speed, threw his car in reverse and jumped from his train, which proceeded to the point of collision, inflicting serious and permanent bodily injuries upon petitioner (R. 47, 48).

There was appropriate pleading and ample proof that an automatic block signal device formerly maintained at Woodlake, but removed some years before by respondent, would have prevented the collision in question if it had been in operation (R. 2, 82, 73, 77). There was further pleading and proof incident thereto that in the "early thirties" respondent had reduced its train crews upon each car and placed the duties formerly performed by two men upon petitioner (R. 72, 73). It was further shown that respondent still compelled petitioner to perform the duties of two men at the time of the collision, although the traffic operations had increased ten-fold (R. 81).

Petitioner further contended that the southbound car was improperly operated immediately prior to the collision (R. 3).

During the course of the trial, respondent was permitted to file amended pleadings alleging that petitioner had assumed the risk of his employment at the time of the collision (R. 9, 100). Petitioner properly requested that the foregoing questions of primary negligence on the part of the carrier be submitted to the jury for determination (R. 12-19). The trial court denied petitioner's request and refused to submit any question of negligence on the part of the carrier to the jury for determination. The court permitted the jury to pass only on question of discovered peril and sole proximate cause (R. 28, 29).

Deprived of a trial by jury upon the questions of the carrier's negligence, and contending that such depriva-

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tion, in effect, forced him to assume the risks of his employment, petitioner appealed.

The Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, Texas, affirmed the judgment of the trial court (R. 147). In its written opinion that affirmed the judgment of the trial court, it likewise denied petitioner a jury trial upon the issues of the carrier's negligence, holding that petitioner was concluded by the "primary duty rule," forcing him in effect to assume the risks of his master's negligence and holding further that the Federal Employers' Liability Act was inapplicable in "primary duty rule" cases. The enlightening language of that opinion is here quoted:

> "It is true that appellant alleged that appellee railway company was negligent in the three respects stated, and that each of such acts constituted negligence and the proximate cause of his injury, but under his foregoing testimony his own disobedience of the time card instruction and the rules of appellee caused the collision and injury to himself. In consequence, neither the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Sect. 51, nor of Art. 6440, Revised Statutes of Texas, have any application to the instant case."

Petitioner, thereafter, without avail followed and exhausted his remedy by appeal in Texas, and this case is now before this Court on writ of certiorari. (Hunter vs. Texas Electric Railway Company, 91 L. Ed., Advance Opinions, No. 11, P. 923)

SPECIFICATION OF ERRORS

The following specifications of error were assigned in the Courts below as the same points of error, and as set out in the petition for writ of certiorari:

FIRST SPECIFICATION OF ERROR

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision.

SECOND SPECIFICATION OF ERROR

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in employing the system it did for the passage of traffic in the sector of the collision.

THIRD SPECIFICATION OF ERROR

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman, in failing to properly slow down his car before reaching the point of collision.

FOURTH SPECIFICATION OF ERROR

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision.

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POINTS PRESENTED AND ARGUMENT

SUMMARY OF ARGUMENT

I. There was error in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision.

A. The error in refusing to allow a jury to determine issues of primary negligence on the part of the carrier remains in the case and cannot be affected by adverse findings upon discovered peril.

B. The question of the carrier's negligence in failing to provide an automatic block signal device in the sector of the collision was sufficiently pleaded and overwhelmingly established by the evidence.

1. The petitioner's trial pleading fully pleaded the question of negligence on the part of the carrier in this regard, and such pleadings were conceded by the Court of Civil Appeals to be sufficient.

2. The evidence is undisputed and overwhelming that if the carrier had retained the automatic block signal device in the sector of the collision as it had formerly done, the collision in question would have been averted.

C. The holding of the Court of Civil Appeals that the failure of the carrier to maintain an automatic block signal device in the sector of the collision was

not negligence and not a proximate cause, as a matter of law, was an attempt to deprive petitioner of a right to trial by jury, and an attempt to insulate the carrier from liability by effectually forcing petitioner to assume the risks of his employment.

1. The names and labels used in the veil of logic constructed will not be allowed to screen the carrier from liability for its negligence by forcing the employee to assume the risks of his employment as an effect.

2. The once fashionable logic resorted to in the "primary duty rule" cases now stands in true and naked form as an assumption of risk, and cannot now be resurrected in direct defiance to the will of Congress.

II. There was error in refusing to submit to the jury issues of negligence on the part of the respondent in employing the system it did for the passage of traffic in the sector of the collision.

A. Petitioner's right to the submission of this issue of primary negligence is unaffected by discovered peril.

B. The question of the carrier's negligence in employing the system it did in the sector of the collision was sufficiently pleaded, and was supported by sufficient evidence to support the jury's verdict.

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1. The petitioner's trial pleading fully pleaded the question of negligence on the part of carrier. In this regard such pleading was conceded by the Court of Civil Appeals to be sufficient.

2. The overwhelming evidence disclosed that after a reduction of train personnel during the depression era, respondent by failing to restore sufficient personnel to man the trains had permitted increased traffic to gradually and stealthily impose a negligent system for the passage of traffic in the sector of the collision.

C. The holding of the Court of Civil Appeals that the system employed by the carrier for the passage of traffic in the sector of the collision in view of the undermanned trains and the increased traffic burdens, was not negligence and not a proximate cause, as a matter of law, was an attempt to deprive petitioner of his right to a trial by jury, and an attempt to insulate carrier from liability by effectually forcing petitioner to assume the risks of his employment.

1. The petitioner's trial pleading fully pleaded the question of negligence on the part of the carrier in this regard, and such pleadings were conceded by the Court of Civil Appeals to be sufficient.

2. The evidence is undisputed and overwhelming that, if the carrier had retained the automatic

block signal device in the sector of the collision as it had formerly done, the collision in question would have been averted.

III. There was error in refusing to submit to the jury issues of negligence on the part of respondent's southbound motorman in failing to properly slow down his car, or make proper application of his brakes as he approached the point of collision.

A. There was requisite pleading and proof to authorize submission of these issues.

1. The pleading was sufficient.

2. The evidence disclosed that the southbound motorman had his car wide open, and was driving it as fast as it would go on a straight-away track going into the curve on which the collision occurred. Petitioner contended that respondent, on testifying, presented sufficient facts from which a jury could have properly inferred negligence.

B. The holding of the Court of Civil Appeals that the failure of the respondent's southbound motorman to properly slow down his car or make proper application of his brakes, and going into the curve where the collision occurred with his car wide open and going as fast as he could make it go, was not negligence and not a proximate cause of the collision, as a matter of law, was an attempt to deprive petitioner of his

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right to a trial by jury, and an attempt to insulate the carrier from liability by effectually forcing the petitioner to assume the risks of his employment.

POINT NUMBER ONE

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision.

ARGUMENT UNDER POINT NUMBER ONE

Petitioner contends that he was denied a trial by jury upon the submissible issues of liability against respondent. His contention in this regard cannot now be affected by contained findings upon issues of discovered peril. *Hines v. Foreman*, 243 S.W. 479; *Dallas Railway Term. Co. v. Bankston*, 51 S.W. (2d) 304.

In its opinion, the Court of Civil Appeals conceded that the allegations of initial liability against respondent were sufficient. However, because of the view it entertained and of the ultimate disposition made of the case, the Court of Civil Appeals completely pretermitted any discussion or statement of petitioner's testimony that so forcefully necessitated the submission of negligence and causation issues against respondent. But such judicial casuistry cannot be indulged in here. Listen to the testimony as it came from the lips of the witness:

> "A block signal system would have stopped me when a time card did not, because there would have been a red light (R. 82). An automatic block signal is an automatic light set-up, showing red—it would have shown red in my face of the other fellow coming. Between Woodlake and Denison they used to have automatic block signals installed (R. 82). They used to have that red signal to stop if there was danger between Woodlake and Denison (R. 73). *(If they had retained the safety devices they had then with the red signal showing the road was not clear ahead, I would have had a warning and would have stopped." (R. 77-8).)* (Italics ours.)

This testimony alone, and in conjunction with other testimony in the record, with forceful and compelling clarity, raised the issues against respondent and commanded their submission.

These safety devices are in common use by railroads for the averting of accidents under these conditions. The evidence is uncontradicted that such safety devices for the protection of petitioner and others and for the prevention of identical and similar accidents were once installed and since removed, and if they had not been removed would have avoided this collision. In any event it was a question for the trier of fact. In *Eglsaer v. Scandrett* (C.C.A. 7th, 1945) 151 Fed. (2d) 562, the Court said:

> " 'Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a com-

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bination of any of these factors, but after logic has thus determined the causal basis of the injury the statute steps in to say that if among these causes there is negligence on the part of the employer as that term is understood in the act, liability of the employer shall follow irrespective of the other factors causally related in whole or in part from negligence even if the negligence of the injured employee or some other factor was logically nearer to or more influential in producing that injury. * * * *(These words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases.)* * * These words suggest that there may be a plurality of causes each of which is sufficient to permit a jury to assess liability.'" (Italics ours.)

In *Bailey v. Central Vermont R. Co.* (U. S. Sup. Ct. 1943), 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062, the Court said:

"The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence', Jacobs v. N.Y., 315 U.S. 752, 86 L. Ed. 1166, 62 Sup. Ct. 854. * * * It is a part and parcel of the remedy afforded railway workers under the Employers' Liability Act. * * * Reasonable care and cause and effect are as illusive here as in other fields, but the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. * * * *(To deprive these workers of the benefits of a trial by jury in close doubtful cases is to take away a goodly portion of the relief Congress has afforded them.)*" (Italics ours.)

The Court of Civil Appeals said:

> "The testimony of appellant having shown as a matter of law that his negligence in violating his time card instruction and the rules of appellee in passing the meeting point without performing the mandatory duties devolving upon him under the rules of appellee was the sole proximate cause of this collision, the only issues that need be submitted were those relating to discovered peril. And the jury having found those issues against appellant he is not entitled to recover." (R. 148)

By refusing to allow the jury to pass upon issues of negligence on the part of the carrier, the Court effectually directed a verdict against petitioner upon his main case.

When the case of an injured but negligent railroad employee is defeated, as a matter of law, by withdrawing from the jury those issues of negligence and requisite causation which he alleged and proved against the carrier, and from which the jury might have reasonably inferred liability—then that employee has been forced to assume the risks of his employment and the negligence of the carrier. In the day of an unenlightened economy, this same result was reached by saying that the negligence proven was that of a fellow servant which the employee assumed, or that the employee's act was contributory negligence. When Congress eliminated these doctrines as a bar to recovery, the Courts began to weave a web of tortuous logic. Now the negligence alleged and proved appeared as a risk inherent in the employment, which the

employee was deemed to have voluntarily assumed by remaining on the job. One variation of this doctrine in the converse appeared as the "primary duty rule," where the master was deemed not to have been negligent because the injuries resulted from the employee's negligent act in violating the master's rule and order, which it was his personal primary duty to obey. In 1939 Congress again struck out with a legislative mandate, but soon the judicial looms began to turn and the weavers began anew. The result is again the same, but the postulate is now found in the field of causation. *Chicago, St. P., M. & O. R. Co. v. Arnold*, 160 Fed. (2) 1002.

The Court of Civil Appeals concluded as a matter of law that the failure to install an automatic block signal device was non-negligence because "* * * the evidence showed that if a block signal system had been installed it would have added nothing to positive time card instructions and the rules of appellee * * *." Or if it was negligence, then it was not actionable negligence—it not being a proximate cause.

Regardless of the name attached or the rigors of reason that brought it forth—regardless of what artifice of logic was utilized in evading the submission of these issues and depriving petitioner of his right to a trial by jury—the result and the effect is the same. It is assumption of risk—pure and simple—artfully arrived at by devious reasoning. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A.L.R. 967.

Owens v. Union Pacific R. Co., 319 U.S. 715, 87 L. Ed. 1683, 63 Sup. Ct. 1271. *Stoffel v. McCahan Sugar Refining & Molasses Co.*, 35 Fed. (2d) 602. *Schlemmer v. Buffalo, Rochester and Pittsburg R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407. *Tennant v. Peoria & Pekin U. R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 Sup. Ct. 409, 15 NCCA (NS) 647.

It is obvious that the trial court and respondent's counsel were proceeding upon this misguided theory when there was filed and permitted to be filed the following trial amendment in the middle of the trial:

> "That the injury received by the plaintiff herein on the occasion in question, if any, resulted solely from a risk he assumed incident to, in the furtherance of, and connected with his employment with the defendant" (9, 100).

This is a "primary duty rule" case. In its fundamental aspect, no attempt has been made to "look at the situation as a practical unit rather than inquire into a purely logical priority." *Union Pacific R. Co. v. Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 Sup. Ct. 318. If any searching analysis had been made it would have been apparent that the theory and effect of the disposition of this case was in direct defiance of the will of Congress. 45 U.S.C.A. 695, Title 45, Sect. 54 as amended, 10-A F.C.A. 139, Title 45, Sect. 54 as amended.

The Court of Civil Appeals, in disposing of this case, said:

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> "It is true that appellant alleged that appellee railway company was negligent in the three respects stated, and that each of such acts constituted negligence and a proximate cause of his injury, but under his foregoing testimony his own disobedience of the time card instruction and the rules of appellee caused the collision and injury to himself. In consequence neither the provisions of the Federal Employers' Liability Act (Title 45, Sec. 51, U.S.C. Anno.) nor of Art. 6440 of the Revised Statutes of Texas have any application to the instant case." (151)

We quote from *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A.L.R. 907:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment and Congress by abolishing the defense of assumption of risk in that statute did not mean to leave open the identical defense of the master by changing the name to 'non-negligence.' "

It is apparent that the trial court, and particularly the Court of Civil Appeals, seized upon *Davis v. Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 Sup. Ct. 33; *Unadilla Valley R. Co. v. Caldine*, 278 U. S. 139, 73 L. Ed. 224, 49 Sup. Ct. 91; and the other "primary duty rule" cases, and in the instant case forced an effect here that resulted in those cases.

It is also clear that application of the "primary duty rule" has been made here in which the contributory negligence of Hunter through violation of a company rule has

become assumption of risk. This is no longer the law. *Keith v. Wheeling & L. E. Ry. Co., et al.* (Circuit Court of App.) 160 Fed. (2) 654.

It is not here contended that Hunter may not have been found guilty of contributory negligence of violating a rule of the company which it was his primary duty to obey. It is simply contended that in doing so he did not assume the risk of his master's negligence and that he was entitled to a submission of these negligence issues. *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 922, 66 Sup. Ct. 740. *Keith v. Wheeling & L. E. Ry. Co., et al.*, 160 Fed. (2) 654. *Tennant v. Peoria & Pekin U. R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 Sup. Ct. 409, 15 NCCA (NS) 647.

In *Spokane & Inland Empire R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 1135, 36 Sup. Ct. 683, in commenting upon the negligence involved in a main line collision by reason of the violation of an order, this Court said:

> "From the fact that he disregarded and in effect violated the order as actually communicated to him, it, of course, does not necessarily follow that he did this wilfully. *(The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental abberation, or inattention, or failure for some other*

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> *reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence)* on his part, and not a departure from the course of his employment." (Italics ours.)

Keith v. Wheeling & L. E. Ry. Co., et al., 160 Fed. (2) 654, contains a state of facts which is analogous to the instant case, and states a principle of law which is here controlling.

The cases cited and relied upon by respondent in the Court of Civil Appeals have been named and overruled by the Supreme Court of the United States. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A.L.R. 967. *Keith v. Wheeling & L. E. Ry. Co., et al.*, 160 Fed. (2) 654.

Quoting again from *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A.L.R. 967:

> "Aside from the difficulty of distinguishing between contributory negligence and assumption of risk, many other problems arose. *(One of these was the application of the 'primary duty rule' in which contributory negligence through the violation of a company rule became assumption of risk. Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 73 L. Ed. 224, 49 Sup. Ct. 91; Davis v. Kennedy, 266 U.S. 147, 69 L. Ed. 212, 45 Sup. Ct. 33. * * * It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption*

> *of risk by whatever name it was called.)* • • • The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all of its various forms of contributory negligence, the fellow servant rule and assumption of risk, must not contrary to the will of Congress be allowed recrudescence under any other label in the common law lexicon. • • • *(No case is to be withheld from a jury on any theory of assumption of risk, and questions of negligence under proper charge from the court should be submitted to the jury for their determination.")* (Italics ours.)

The opinion of the Court of Civil Appeals reveals that it could have labored under no greater misapprehension of the law than it did. The Court of Civil Appeals by its opinion attempted to re-write into the Employers' Liability Act an exception that Congress in clear, unmistakable language wrote out of it. Congress did not say that certain risks would be assumed in the event of violation of a primary duty. Instead, it obliterated every vestige of assumed risk. The spectre of that narrow, illiberal, judicial reasoning that has scored the railroad worker these many years has again reared its ugly head.

Petitioner earnestly insists that the opinion of the Court of Civil Appeals wholly, incorrectly and wrongfully states the law of this case, and he earnestly insists that he was denied the right of trial by jury in the refusal to submit his liability issues against respondent.

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POINT NUMBER TWO

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in employing the system it did for the passage of traffic in the sector of the collision.

ARGUMENT UNDER POINT NO. TWO

It is necessary to quote pertinent portions of petitioner's testimony:

> Right below the motorman's window is a train number box which is the number of your train. On this occasion I looked over my shoulder and thought I saw the man there. I did not definitely ascertain whether he was train 15 or whether he was carrying any signals. I didn't ascertain that that man had classification signals or car classification (R. 58-59). I went by there and I thought I saw him over there. It could have been an extra in there. I stopped there and waited there a half a minute and looked over my shoulder and said, 'there he is'. He didn't blow any signal. He was supposed to if he was carrying a green flag. (R. 81-2). My visibility was good that day. There was nothing to obstruct my view from seeing the car until I got to the stop. I did not see the man when I got to the pass. Then I got down there and looked over my shoulder. I had passed the telephone booth then and it appeared that it was a place there by the interurban. (R. 82)"

It further appears from petitioner's testimony, in substance, that respondent's cars were formerly manned by a conductor and a motorman, but that during the depres-

sion years of the early "thirties" the conductor was removed and his duties assumed by the motorman. (R. 45). His duties consisted in operating the car, reading the time card, making meeting points, identifying the cars, collecting fares, making out duplicate cash fare receipts, issuing the passenger a duplicate receipt, making change, fixing the trolley, and doing everything there was to do (R. 72, 73). All of these duties had been performed by Hunter for approximately ten years prior to the collision but under different circumstances. The volume of passengers and traffic at the time of the collision had increased ten-fold since the time the conductor had been removed (R. 81).

It is clear from the foregoing testimony that respondent, during the bleak, poverty-stricken years of the early "thirties" had retrenched its operating expenses by reducing its personnel and placing upon the shoulders of petitioner the multiplied responsibilities and duties of more than one man. It no longer left the motorman free to devote his exclusive attention to the operation of the car. But with the return of fruitful years and inordinate transportation burdens—while this nation writhed in the throes of an unparalleled transportation crisis—respondent railway, growing sleek and thoughtless, while its transportation and revenues mounted ten-fold, did not see fit to place conductors again upon its cars and lighten the burden of those situated as was petitioner. Instead, it chose to permit time and changing conditions to create a

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negligent and dangerous system for the passage of traffic in the Woodlake sector that finally resulted in the collision.

It is submitted that the conclusion created and inference to be drawn from the foregoing testimony is that there was another car, possibly an extra, at or near the Woodlake passing track which petitioner, looking over his shoulder, concluded to be train number 15. It developed that the car concluded to be number 15 was not in fact number 15. Proceeding further with this conclusion, the most that could be said was that Hunter's negligence consisted in failing to identify the car he thought he saw as number 15. It further appears from the testimony that the method of identification of a particular train was by the numbers contained in the train number box. It does not appear that the car, possibly an extra, which Hunter contended he took to be number 15, had any numbers in the train number box, or if it did, what those numbers were. There is no testimony showing that the train box numbers, if there were any, were visible to Hunter under the conditions and circumstances prevailing at the Woodlake sector. Hunter knew he was to meet number 15 at Woodlake. The time card instruction added nothing to his knowledge.

It is contended that the method of providing identification by numbers alone, in the light of all the multiplied and additional duties that had been vested upon petitioner and not removed, although traffic had increased ten-fold, was negligence. It is an inference and a con-

clusion that a jury would have been warranted in drawing. *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 922, 66 Sup. Ct. 740. The Court of Civil Appeals entirely misunderstood the contention here made.

Petitioner submits that this was an issuable fact of negligence which he was entitled to have submitted to the jury and that error was committed in not so doing. The effect of the holding of the trial court and the Court of Civil Appeals is to compel petitioner to assume the risk of this negligence. Petitioner here adopts in support of this contention the argument advanced under his First Point of Error.

POINT NUMBER THREE

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman, in failing to properly slow down his car before reaching the point of collision.

POINT NUMBER FOUR

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision.

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ARGUMENT UNDER POINTS NUMBERS THREE AND FOUR

The third and fourth points of error are germane to each other and can be properly covered together.

These issues were raised by the testimony of Maxwell, the southbound motorman, which, in substance, is materially as follows:

> "I was driving as fast as the car would go (R. 128). I wouldn't swear how fast they would go because they had no speedometers. But I had it wide open. I was on a straight-away track when I saw him and I had it wide open. When I saw Mr. Hunter's car I was on a straight-away track just prior to the time I reached the curve. I had it wide open—the car was going just as fast as I could make it go." (R. 129)

It is evident that the southbound motorman was on a straight-away track with his car wide open. It was going as fast as it was possible to make it go. This was on a straight-away track going into a curve. It was certainly testimony from which a jury may have concluded that the southbound motorman was failing to use the care that an ordinarily prudent person would have used under the same or similar circumstances. It is not sufficient to contend that Hunter's presence could not have been foreseen. The presence of someone rightfully upon the track could have been foreseen. It might have been a section crew. It might have been a hand-car. It might have been a stalled car. It might have been any combination of things. It was certainly an issuable fact for a jury to

say whether or not these acts set out in the foregoing testimony were negligence. The effect of the holding of the trial court and of the Court of Civil Appeals has visited upon this petitioner and forced him to assume the risk of these acts of negligence on the part of the south-bound motorman. In support of this argument petitioner here adopts the argument advanced under his First Point of Error.

CONCLUSION

WHEREFORE, petitioner respectfully prays that the judgment of the State Courts in this case, and of the Court of Civil Appeals, be reversed, and that this case be remanded to such Courts, to the end that uniformity may prevail and that justice may be done.

Respectfully submitted,

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No. [redacted] 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

R. P. HUNTER, *Petitioner*

vs.

TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD JUDICIAL DISTRICT OF TEXAS AT AUSTIN, TEXAS

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No. 893

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TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Respondent, Texas Electric Railway Company, respectfully shows to the Court that the petition for Writ of Certiorari in this case should be denied, for the reason that the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin,

Texas (R., p. 147), reported in 194 S. W. 2d 281, correctly states the law in the case.

CONCISE STATEMENT OF THE CASE

The Respondent does not believe that the statement of this case made by the Petitioner correctly presents all of the facts in this case. The Respondent does believe that the statement of the facts, as set forth in the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, does set forth correctly, fairly and impartially such facts, and Respondent here adopts that portion of said opinion as its statement of the case. (R. 147, 148, 149, 150 and the first 6 lines of page 151)

THE BASIC QUESTIONS

There are but two Basic Questions involved in this appeal:

1. Can the Petitioner recover any damages for personal injuries sustained by him as a result of a collision between two of the Respondent's interurban cars, which collision was caused by the Petitioner's negligent violation of the company's rules and the time card order?
2. Can the Petitioner recover under the Federal Employers' Liability Act for injuries received by him as the result of a head-on collision between two of the Respondent's interurban cars, when the jury found that his negligence was the sole proximate cause of Petitioner's injuries?

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BASIC QUESTION NO. 1 PRESENTED AND ARGUMENT IN CONNECTION THEREWITH

The Petitioner presents in this Court four specifications of error (petition for Writ of Certiorari, p. 8) claiming that he was denied the right of trial by jury because the Court did not submit for the consideration of the jury the following acts of negligence:

1. Failure of the Respondent to provide an automatic block signal device in the sector of the collision.

2. Failure of the Court to submit to the jury the issue as to whether or not the Respondent negligently employed the system it did for the paasage of traffic in the sector of the collision.

3. The refusal of the Court to submit to the jury whether or not the operator of the South bound motor car failed to properly slow down his car before reaching the point of collision, and whether or not this was negligence.

4. The failure of the Court to submit to the jury the issue whether or not the motorman on the South bound motor car failed to apply his brakes as he approached the point of collision and whether or not this was negligence.

STATEMENT UNDER FIRST BASIC QUESTION

The opinion of the Court of Civil Appeals for the Third Judicial District of Texas, sets forth correctly, fairly and impartially a clear picture of the transaction in question. The same is here adopted. (R., p. 147, 148, 149, 150 and first 6 lines page 151)

AUTHORITIES UNDER FIRST BASIC QUESTION

Unadilla Valley Railway Company vs. Caldine, 73 L. Ed. 224, 278 U. S. 139, 49 Sup. Ct. 91

Southern Railway Company vs. Youngblood, 76 L. Ed. 1124, 286 U. S. 313

Southern Railway Company vs. Dantzler, 76 L. Ed. 1127, 286 U. S. 319

Willis vs. Pennsylvania Railroad Company, 122 Fed. 2d 248 (Writ of Certiorari denied), 86 L. Ed. 547, 62 Sup. Ct. 187

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Bishop vs. Texas & Pacific Railway Company, 62 S. W. 2d. 247

Brady vs. Southern Railway Company, 88 L. Ed. 239, 320 U. S. 476, 64 Sup. Ct. 232

Davis vs. Kennedy, 69 L. Ed. 212, 266 U. S. 147, 45 Sup. Ct. 33

ARGUMENT UNDER FIRST BASIC QUESTION

The facts in this case disclose that R. P. Hunter was an old and trusted employee of the Respondent; that he had worked for it for 31 years as an operator and dispatcher, and in the latter capacity he was an official of the company. He was thoroughly familiar with the rules and regulations of the company, not only from the standpoint of a working employee, but from the standpoint of an official of the company. He was furnished by the company a time card. Upon this time card there were certain positive meets with other cars and, if he failed to obey the instructions of the time card, a collision would result. At the time of this unfortunate occurrence he did overlook the time card. He violated every known instruction and duty that he owed not only to himself and to the Respondent, but to the passengers on his car. *He just did not do that which he was commanded, required and was his duty to do.*

By a long line of decisions in the construction of the Federal Employers' Liability Act, the Courts have held that an employee who violates a positive order and is injured as a result thereof, cannot recover damages under

the Federal Employers' Liability Act. In the case of Unadilla Valley Railway Company vs. Caldine, 73 L. Ed. 224, 278 U. S. 139, 49 Sup. Ct. 91, a lengthy discussion was given by this Court in a case where an employee of the Railway Company violated his positive written orders just as the Petitioner Hunter did in this case. Instead of waiting for the train he was supposed to wait for, he disobeyed the order, the purpose of which was to prevent a collision. He, without any excuses for disobeying it, pulled out on the main line and was killed; and, in passing upon the very point in question, the Court said:

> "It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

The Petitioner, R. P. Hunter, was the sole operator of the interurban car in question. He was certainly in command, and his own wilful or intentional violation of the rule caused the accident and the resulting injuries to himself. This, in the opinion of the Respondent, is a much stronger case against an employee than was the Caldine case.

In the case of Southern Railway Company vs. Youngblood, 76 L. Ed. 1124, 286 U. S. 313, the positive violation of a written order by a motorman precluded him from a recovery under the Federal Employers' Liability Act. In the case of Southern Railway Company vs. Dantzler, 76 L. Ed. 1127, 286 U. S. 319, the same rule was announced. It might be argued that the 1939 amendment to the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 54, casts aside and overrules these decisions of this Court. However, in the case of Willis vs. Pennsylvania Railroad Company, 122 Fed. 2d. 248 (Writ of Certiorari denied), 62 Sup. Ct. 187, 86 L. Ed. 547, the Court made the following statement:

> "If the testimony of Donofrio and Myers is believed, Willis' neglect of his personal duty to act as watchman was the sole cause of his death. In such circumstances his executrix can have no recovery under the Act. Great Northern Ry. v. Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732; Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; Unadilla Ry. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; Blunt v. Pennsylvania R. Co., 6 Cir., 9 F. 2d 395; Unadilla Valley Ry. Co. v. Dibble, 2 Cir., 31 F. 2d 239. The recent amendment, 45 U. S. C. A. Sec. 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault.

The Supreme Court of Missouri, in the case of Joice vs. Missouri-Kansas-Texas Railroad Company, 189 S. W. 2d 568, at page 574 makes observation in connection with a

case wherein an employee's injuries were not caused solely by a positive violation of a rule as follows:

> "With respect to proximate cause the case is not comparable to a conductor's proceeding ahead of his train contrary to positive written orders to wait on a side track as was the fact in Unadilla Valley Ry. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224, and Southern Ry. Co. v. Youngblood, 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124."

The Employers' Liability Act of the State of Texas, insofar as the same affects common carriers, as found in Art. 6440, et seq., of the Revised Statutes of Texas, 1925, is similar in many respects to the Federal Employers' Liability Act. It shall not be the purpose of the Respondent to give a detail holding of the various Texas Courts in their construction of the Texas Act, or in their construction of the Federal Employers' Liability Act. However, a review of the authorities herein cited will reveal that the above construction has been given by the Texas Courts to both Acts.

In closing, we invite the Court's attention to the following part of the Petitioner's testimony in the trial Court (R. the last 3 lines on page 63 and the first 4 lines of page 64):

> Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake as the time card and rules required you do, this (referring to the collision) would not have happened?
>
> A. No.

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This clearly demonstrates the position of the Respondent. Hunter's act and his act alone caused the collision.

BASIC QUESTION NO. 2 PRESENTED AND ARGUMENT IN CONNECTION THEREWITH

STATEMENT UNDER SECOND BASIC QUESTION

The trial Court submitted this case to the jury under proper instructions and under proper interrogatories embracing the doctrine of imminent or discovered peril (R. 23, 24, 25 and 26), and propounded to the jury the following interrogatory:

> Do you find from a preponderance of the evidence that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the South bound interurban car upon the occasion in question was the sole proximate cause of his injuries, if any he received? (R. 27)

The jury, in answer to the interrogatories propounded to it, found that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the South bound interurban car on the occasion in question caused him to be in a position of peril as he approached the point of the collision. (R. 28)

The Court, in submitting the doctrine of imminent or discovered peril, submitted the following interrogatory:

> "Do you find from a preponderance of the evidence that the operator of the defendant's South bound interurban car, on the occasion in question, actually dis-

covered the plaintiff's perilous position in time to have averted injury to the plaintiff by the use of all means at his command commensurate with his own safety and the safety of his passengers and the inter-urban car which he was operating?

Answer Yes or No.

Answer: No." (R. 28)

As above stated, the court propounded to the jury the following special interrogatory:

"Do you find from a preponderance of the evidence that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the South bound inter-urban car upon the occasion in question was the sole proximate cause of the injuries, if any he received?

Answer Yes or No.

Answer: Yes." (R. 30)

The Court, with ample instructions in connection therewith, propounded the damage issue as follows:

"What amount of money if paid now in cash will compensate the plaintiff, R. P. Hunter, for the personal injuries, if any, sustained by said plaintiff on the occasion in question?

Answer in Dollars and Cents.

Answer: None." (R. 30)

AUTHORITIES UNDER SECOND BASIC QUESTION

Federal Employers' Liability Act, 45 U. S. C. A., Title 45, Sec. 51, et seq., 10 F. C. A., Title 45, Sec. 51, et seq.

Tiller vs. Atlantic Coast Railroad Company, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444

Tennant vs. Peoria & Pekin Railway Company, 88 L. Ed. 520, 321 U. S. 29, 64 Sup. Ct. 409

Reese vs. Philadelphia Railroad Company, 239 U. S. 463, 60 L. Ed. 384, 36 Sup. Ct. 134

Wheelock vs. Freiwald (C. C. A. 8th) 66 F. 2d 694

Jessionowski vs. Boston & Maine Railroad Company, 91 L. Ed. 355 (Advance Sheet 5)

Brady vs. Southern Railway Company, 88 L. Ed. 239, 320 U. S. 476, 64 Sup. Ct. 232

ARGUMENT UNDER SECOND BASIC QUESTION

The Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, 10 F. C. A., Title 45, Sec. 51, provides that every common carrier by railroad, while engaged in interstate commerce shall be liable in damages to the person suffering such damages, etc., —"resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." It was, therefore, necessary that R. P. Hunter show to the satisfaction of the jury that his

injuries were caused in whole or in part by the negligence of the railway company, or some of its officers or employees. It was admitted in the trial Court, and is admitted here, by the Petitioner that he was negligent. The jury found that his negligence was the sole proximate cause of his injuries. Therefore, under the terms of the Act itself, the Petitioner, R. P. Hunter, under the jury's finding, is not entitled to recover. It is elementary under the Federal Employers' Liability Act that where the jury finds the injuries resulted solely from the plaintiff's own negligence, he cannot recover. We believe, therefore, that a comprehensive citation of authorities is unnecessary.

In the case of Jessionowski vs. Boston & Main Railroad Company, 91 L. Ed. 355, Advance Sheet No. 5, decided January 13th, 1947, this Court put its stamp of approval on instruction given by the trial Court reading, in part, as follows:

> "Of course, if the deceased's negligence was the sole cause of the accident the plaintiff here cannot recover."

It is argued at length in the Petitioner's brief that he was denied a trial by jury. Nothing could be further from the true facts. He was given a jury trial. The jury found, in substance, that the operator of the South bound motor car, upon discovering the Petitioner's perilous position, used all the means at hand commensurate with his own safety, the safety of his passengers and the motor car he was driving to avoid a collision. The jury found that

the Petitioner's negligence in failing to wait at the Woodlake passing track, as the time card and the rules of the company required him to do, and he himself knew he was supposed to do, was the *sole* proximate cause of his injuries, if any.

The trial Court correctly submitted the issue of damages; in other words, how much had he suffered as the result of the injuries received by him on the occasion in question, and the jury answered none.

In its last analysis, the Petitioner's case was submitted to the jury in keeping with the mandates and decisions of this Court, and the jury found against him.

For this Court to go behind the positive finding of the jury and overthrow the decision of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, would make the Respondent an insurer of the safety of the Petitioner and its other employees. This the Respondent does not believe the Court will do since this Court in the case of Tennant vs. Peoria & Pekin Union Railway Company, 88 L. Ed. 520, 321 U. S. 29, 64 Sup. Ct. 409, quoting therein from Tiller vs. Atlanta Coast Railroad Company, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, said:

> "In order to recover under the Federal Employers' Liability Act it was incumbent upon the Petitioner to prove that Respondent was negligent and that such

> negligence was the proximate cause in whole or in part of the fatal accident."

In other words, it was Hunter's duty to convince the jury that his negligence was not the sole proximate cause. This he failed to do and the jury not only found that he was solely negligent, but that he was entitled to recover no damages whatsoever.

Quoting from the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, who had the entire record before them and whose fact findings have never been questioned by the Petitioner in any Court, as follows:

> "There was no proof whatever that the time card system was inadequate, and the evidence showed that if a block system had been installed it would have added nothing to the positive time card instructions and the rules of Appellee, which Appellant violated without cause and which was the sole efficient cause of the collision and his injury." (R. 152)

The jury, by its findings, acquited the fellow employee Maxwell of any negligence. Therefore, the Respondent in this case, under the record, could have been guilty of no negligence.

The Respondent thinks that the rule announced by this Court in the case of Brady vs. Southern Railway Company, 88 L. Ed. 239, 320 U. S. 476, 64 Sup. Ct. 232, as follows:

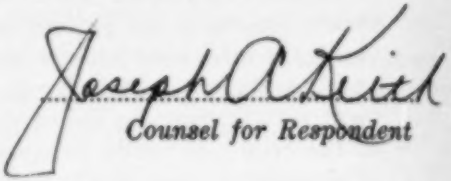
> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

is certainly applicable to this case.

Certainly the Respondent is not the insurer of the safety of its employees, and it has never been the intention of the law to make the Respondent such. The rule is very tersely stated in the case of Wheelock vs. Freiwald (C. C. A. 8th) 66 F. 2d. 694, as follows:

> "(1) The Federal Employers' Liability Act does not make an employer an insurer of the safety of its employees, but to entitle plaintiff to recover the defendants must have been guilty of some act of negligence which was the proximate cause of Freiwald's death. Baltimore & O. R. Co. v. Berry, 286 U.S. 272, 52 S. Ct. 510, 76 L. Ed. 1098; Atchison, T. & S. C. R. Co. v. Toops, 281 U.S. 351, 50 S. Ct. 281, 74 L. Ed. 896; Coyne v. Union Pac. R. Co., 133 U. S. 370, 10 S. Ct. 33 L. Ed. 651; Reese v. Philadelphia & R. R. Co., 239 U. S. 463, 36 S. Ct. 134, 60 L. Ed. 384."

WHEREFORE, the Respondent prays that the petition for Writ of Certiorari in this case be denied.



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IN THE

Supreme Court of the United States

OCTOBER TERM—1947

Number [redacted] 893

R. P. HUNTER, *Petitioner*

vs.

TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI

CHALLENGE OF GROUNDS OF JURISDICTION

A.

This Court has no jurisdiction based upon Paragraph B. of Section 344, Title 28 of the Jurisdictional Code as amended, 28 U.S.C.A. 344, because this suit does not infringe upon any title, right, privilege or immunity spe-

cially set up or claimed by any party under any statutes of the United States.

B.

This Court has no jurisdiction to review on Writ of Certiorari under Section 5, Rule 38 of the Revised Rules of the Supreme Court of the United States because the Petitioner, R. P. Hunter, at the time of the happening of the incident in question was not engaged in interstate commerce but was engaged wholly in intrastate commerce, and his rights were confined solely to those given by the laws of Texas in this regard, and the refusal of the Writ of Error by the Supreme Court of Texas (R. 154) foreclosed to the petitioner any right that he might have had under the laws of the State of Texas.

STATEMENT

It is undisputed that at the time of the happening of the incident in question, the Petitioner was and had been for about a year and a half working between the cities of Denison and Sherman, Grayson County, Texas, making five round trips a day between the two cities (R. 44). He was operating what is known as a "plug" run between the two cities. He was engaged solely in handling passengers, express, if there was any to go, and baggage (R. 44-45). There is no showing in the record that the Petitioner handled anything except the aforementioned

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passengers, express, and baggage between the two cities. There is no showing in the record that he ever handled interstate express. There is no showing in the record that he ever handled any interstate baggage. There is no showing in the record that the Respondent ever issued or the Petitioner ever handled any interstate tickets. The record conclusively shows that he handled only passengers between the cities of Denison and Sherman in Grayson County, Texas. The distance between Denison and Sherman being approximately ten (10) miles. It is true as found by the Court of Civil Appeals that the Texas Electric Railway Company was engaged in interstate commerce. (R. 148).

ARGUMENT AND AUTHORITIES

U.S.C.A., Title 45, Section 51 provides in part as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The above quoted section is what is commonly known and referred to as the 1939 Amendment to the aforesaid Section 51, and does extend the benefits and includes greater numbers of railroad employees than did the Act

as it existed prior to August 11, 1939. It cannot be insisted that the so-called 1939 Amendment included all employees of railroads or interurban lines because Congress does not have the power to pass such an act extending the benefits of the Federal Employers' Liability Act to all employees of interstate railroads or railroads engaged in interstate commerce. If it did, such actions on the part of Congress would be unconstitutional. The original Federal Employers' Liability Act of June 11, 1906, was unconstitutional for the reason that it did attempt to extend to all employees of railroads engaged in interstate commerce. See, *Howard vs. Illinois Central Railroad Company*, 28 S. Ct. 141; 207 U.S. 463; 52 L. Ed. 297.

The Act under consideration was passed April 22, 1908, and was held to be constitutional for the reason that it only covered those employees engaged in interstate commerce. See, *Mondou vs. New York, N. H. & H. R. Co.*, 32 S. Ct. 169; 223 U.S. 1; 56 L. Ed. 327.

The quoted section of the Act as amended became effective August 11, 1939.

The original Act was construed by this Court to embrace only those employees who at the very time of the injury was engaged in interstate commerce. See, *Illinois Central R. Co. vs. Berhens*, 233 U.S. 473, 58 L. Ed. 1051, 34 S. Ct. 646.

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The case of *Illinois Central R. Co. vs. Perry*, 242 U.S. 292, 61 L. Ed. 309, 37 S. Ct. 122 was a case in which a railroad employee was engaged in service between two points within the state. He made a round trip every day. He did carry interstate freight on the going out trip, but at the time he was injured on the return trip he was handling only intrastate or domestic commerce. The court held that he was not engaged in interstate commerce within the meaning of the Act on his return trip and thus did not come under the Act.

The case of *Thaxton vs. Louisiana Ry. and Nav. Co.*, 95 Southern 773, decided by the Supreme Court of Louisiana, was a case wherein a conductor engaged in shuttle train service between Alexandria and Camp Beauregard in the State of Louisiana. The train oscillated daily without ever going beyond either the city or the camp. In this case it was admitted that the railroad itself was engaged both in intrastate commerce and in interstate commerce. The railroad itself extended only from New Orleans to Shreveport, entirely within the state of Louisiana. The Court held that the showing made was wholly insufficient to bring the plaintiff within the Federal Employers' Liability Act. That is, the court held that he was not engaged in interstate commerce at the time he received his injury.

The case of *Boyle vs. Pennsylvania R. Co.*, 228 Fed. 266, was a case wherein the plaintiff's intestate was en-

gaged as a car inspector. The defendant was operating companion trains going in opposite directions between Philadelphia and Pottsville, wholly within the state of Pennsylvania. They were scheduled to meet at Phoenixville. It was the duty of the decedent to inspect both trains. After inspecting the first train, he was awaiting the arrival of the second train, leaning against the engine of the train he had just inspected. While in this position, he was struck by the engine of the incoming train and killed. Both trains were operating between points in the state of Pennsylvania. Both were advertised on defendant's time table to connect West Philadelphia with trains to and from New York. *Neither* train at the time of the injury of the deceased was shown to have been carrying passengers, baggage or express matter in interstate commerce. The court held that under these circumstances the deceased at the time of his injury was *not* engaged in interstate commerce.

The Case of *Watts vs. Ohio Valley Electric Ry. Co.* by the Supreme Court of West Virginia, 88 S.E. 659, was a case brought by an injured employee against an electric interurban line. The evidence showing the railroad company was engaged in both interstate and intrastate commerce. In fact, it extended from one state to another, that is, from West Virginia over into Kentucky. The car operated by plaintiff operated within the city limits of Huntington, West Virginia, between Ninth and Twenty-sixth Streets, East. Under the rules of the com-

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pany, a passenger on the westward bound car who desired to go further than the end of that line was given a transfer which entitled him without the payment of additional fare to ride on a Huntington and Ashland car as far as Camden Park, West Virginia; and by the payment of additional fare after he reached that point, he could continue on the same car to Ashland in the state of Kentucky. It is true that in this case the plaintiff received his injury within the city of Huntington, West Virginia, but on a run involving the movements above set out. In disposing of the contention that the plaintiff was engaged in interstate commerce, the court said:

> "Defendant is an interstate, as well as an intrastate, carrier; and, in certain cases, is liable under the federal act for injury to an employee. But that act does not apply, unless the injured servant and the carrier are both, at the time of the injury, engaged in interstate traffic. See Federal Employers' Liability Act; Pedersen v. Delaward, etc., R. Co. 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1941C, 153; Easter v. N. & W. Ry. Co., 86 S. E. 37; Richey on Federal Employers' Liability, 67, and numerous cases cited in note. The car on which plaintiff was motorman was operated wholly within the city limits of Huntington, and, at the time of the collision, was carrying no passengers. Hence it was not, in any sense, then engaged in interstate commerce."

The facts in the last three named cases are much stronger and display much more activity as affecting interstate commerce than the case at bar. In this case, the Texas

Electric Railway Company operated wholly within the state of Texas, and the activities of Hunter as will be hereinafter shown were confined solely to intrastate commerce.

But the matter being argued that the so-called 1939 Amendment to the Federal Employers' Liability Act changes the rule so that the same would include employees such as Hunter. We do not think so. We do think that a true test of the 1939 Amendment was laid down by the Supreme Court of Missouri in the case of *Taylor vs. Lumaghi Coal Company*, 181 S.W. (2d) 536, which court expresses the correct rule as follows:

> "It seems to us that the test, 'any part of whose duties shall be in furtherance of interstate commerce,' means to include, at least, any part of such employee's duties on the particular mission or continuous operation to which he is assigned for the particular work period or tour of duty on which he has commenced to serve."

The Maryland Court of Appeals, in the case of *Albright vs. Pennsylvania R. Co.*, 37 Atl. (2d) 870, in a well considered opinion laid down what we consider to be the correct rule, as follows:

> "The present test as to whether one is engaged in interstate commerce is: Were his duties or any part thereof at the time of injury in furtherance of interstate commerce; or did his duties affect in any way, directly or closely and substantially, such commerce? If so, then the employment is in interstate commerce."

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See also the holding of the New York Court of Appeals in the case of *McGowan vs. New York Central R. Co.*, 39 N.Y. Supp. (2d) 533, 50 N.E. (2d) 295, where an assistant terminal foreman who was injured while working on or about a locomotive boiler was not employed in interstate commerce under the 1939 Amendment, and hence was covered by the New York Workmen's Compensation Law and not by the federal law.

A reading of each of the above cases will disclose that Hunter's activities were much more unrelated to interstate commerce than any of the above.

Now, in this case the facts reflect that Hunter's duties did not in any way further interstate or foreign commerce, nor in any way directly or closely and substantially affect such commerce. He was only engaged as an operator of a "plug" interurban between the cities of Denison and Sherman, Texas, a distance of approximately ten (10) miles.

The record conclusively evidences the fact that he left Sherman at 7:05 o'clock in the morning, made five round trips to Denison, and then was through for the day. There is no showing that he was ever delivered a connecting line ticket entitling the holder to a trip in interstate commerce. (In truth and in fact the Texas Electric Railway Company does not under any circumstances sell such tickets or accept the same.)

He did testify that once in a while he did [redacted] handle baggage, [redacted] or express moving in INTRASTATE [redacted] commerce. In truth and in fact there is no showing in the record that Hunter was in any wise at any time and upon any occasion for a period of a year and a half before his injuries engaged in interstate commerce.

His activities as disclosed by his own testimony and the record in this case were confined solely to intrastate commerce.

If this Act is extended to include the Petitioner, R. P. Hunter, then any employee doing any work for any railroad in any capacity, clerical or otherwise, would be engaged in interstate commerce within the purview of the Act and would be entitled to the rights and privileges of the Federal Employers' Liability Act.

It is respectfully submitted that this was not the intention of Congress, and in truth and in fact Congress did not have this power, because, as above stated, had Congress attempted to bring every employee of every common carrier within the Act, then such action on the part of Congress would have been unconstitutional and of no force and effect.

The Petitioner's remedies were governed solely by the laws of Texas and he having appealed to all of the forums of the State of Texas, and they having decided adversely to his contention, it is respectfully submitted that his

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remedies, if any he had, have been fully and finally foreclosed to him, and this Court has no jurisdiction to hear and determine this cause on petition for certiorari.

ANSWER TO PETITIONER'S BRIEF

Without waiving the foregoing contest of jurisdiction and still insisting that this court does not have jurisdiction to review this case of certiorari, the Respondent in answer to Petitioner's brief would respectfully submit the following:

The Respondent calls the attention of the Court to Petitioner's specifications of error found on page 6 of his brief.

These specifications of error from first to fourth, inclusive, appear to us to be vague, indefinite and insufficient. It will be noted that there is no showing in the specifications of error that the Petitioner submitted to the State Trial Court requested issues upon the proximate cause of any of the negligence complained of in said specifications of error. It is not made to appear in said specifications of error that the court refused to submit issues as to proximate cause. If the court, upon examination, concludes that the submission of the questions of negligence in the respect complained of in the specifications of error without request from the Petitioner, and the refusal of the court to submit issues as to proximate cause would be without avail. It seems

that there is no specification of errors sufficient to warrant further consideration of the cause. Attention is called to the condition of said specifications so that if the Court elects to do so, examination may be made and conclusion reached as to the sufficiency of each and all of said specifications of error.

CONCISE STATEMENT OF THE CASE

The statement of the CASE set out by the Petitioner on page 2 et seq. of his brief does not correctly state the case but is replete with conclusions of Petitioner's counsel, and for that reason is challenged in toto by the Respondent.

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas (R. 47 et seq., 194 S.W. (2d) 281), which is nowhere challenged either by the Petitioner or the Respondent, does set forth correctly, fairly and impartially such facts and the same is adopted by the Respondent as its concise statement of the case as follows:

"Appellant, R. P. Hunter, sued Appellee, Texas Electric Railway Company, to recover damages for personal injuries sustained in a head-on collision between an electric motor car driven by himself and a similar one driven by T. N. Maxwell. Appellant admitted that in violation of his time card instruction and the rules of appellee he proceeded about three-fourths of a mile beyond the siding

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where he was to meet and pass the car driven by Maxwell, which fact caused the collision between the cars. In consequence the trial court submitted only issues of discovered peril, which the jury found against appellant; and conditionally on having answered "no" to the discovered peril issue, an issue as to whether the negligence of appellant in passing the meeting point was the sole proximate cause of the collision, which the jury answered in the affirmative. Accordingly judgment was rendered for appellee. Appellant contended that his pleadings and evidence raised jury issues on three acts of negligence as the proximate cause of the collision, and that the court erred in refusing to submit his requested special issues for jury findings thereon. The three acts of negligence were as follows:

1. That appellee was negligent in failing to provide an automatic block device in the sector of the collision, or in employing the time card system it did for the passage of cars in the sector of the collision.

2. That the operator (Maxwell) of the southbound car failed to properly slow down his car before the collision.

3. That Maxwell failed to apply the brakes on his car as he approached the point of the collision.

The testimony of appellant having shown as a matter of law that his negligence in violating his time card instruction and the rules of appellee in passing the meeting

point without performing the mandatory duties devolving upon him under the rules of appellee was the sole proximate cause of this collision, the only issues that need be submitted were those relating to discovered peril. And the jury having found those issues against appellant, he is not entitled to recover.

The evidence shows that appellee railway line here involved is operated between the cities of Sherman and Denison. Appellee operates electrically propelled interurban cars for carrying passengers and freight for hire, and is engaged in interstate commerce. Each passenger car is operated by one man known as an operator. To facilitate the movement of cars, called trains, between Sherman and Denison, appellee furnished each operator daily with a time card. The time card under which appellant was operating at the time of the collision was hung on a hook immediately in front of where he was seated on the left hand front of the car. It required five trips daily by him from Sherman to Denison, a distance of 10 miles, and this schedule had been the same for the previous six months. Appellant had been employed by appellee or its predecessors for about 32 years, the first 8 as a dispatcher handling the movement of cars or trains, and the last 24 years as an operator, and for the last 11 years he had operated a one-man car or train over the route between Sherman and Denison under the time card method or system. The time card required appellant to meet, wait for, and pass the car operated by Maxwell at a siding called Wood-

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lake. On May 2, 1944, on his fourth trip for the day, appellant left Sherman at 2:30 on schedule time, going north to Denison. He was operating "Train No. 58," which was to meet, wait for, and pass "Train No. 15," operated by Maxwell at 2:45 at Woodlake. The time card and rules of appellee required appellant to wait there for the Maxwell train to pass on the siding, and if the Maxwell train should display a certain flag showing another section or extra train following, to wait until same had passed on the siding before he should proceed. If the Maxwell train or car were late, appellant was required under the rule to go to the nearby phone booth of appellee and call the dispatcher for further orders before proceeding.

Appellant testified that he reached Woodlake about on time; that he glanced over his shoulder and thought he saw Maxwell's car on the siding; that in about one-half of a minute without looking for any flag that might be displayed or without phoning the dispatcher, he passed the meeting point and had proceeded about three-fourths of a mile when he saw the Maxwell car coming around a curve very fast, and the collision occurred at about 2:47. Appellant testified that when he saw the Maxwell car he brought his car to about a stop; that Maxwell judging from the action of his car, appeared to have thrown it in reverse, a method of stopping it quickly, and then Maxwell jumped from the door of his car, which proceeded to the point of the collision, the impact of which crushed the front end of both cars, breaking appellant's

leg and otherwise injuring him, and also a number of passengers. Appellant admitted that he violated the instruction on his time card and the rules of the company in proceeding beyond the meeting point, and as to the cause of the collision appellant testified:

"Q. Now, No. 15 was coming along in a southerly direction. That is where he is supposed to be. A. Yes, sir.

Q. At that time, you were supposed to be waiting back at Woodlake. A. Yes, sir.

Q. And you didn't wait for him at Woodlake, as the time card required you to do. A. I didn't, no.

Q. And you passed that meeting point and met him down at the curve. A. Yes.

Q. During all that time you had been following this regular schedule that you outlined to the jury, leaving Sherman at those various times. A. Yes, sir.

Q. This is the only time in the six months period that you failed to stop and wait for No. 15 at Woodlake, or call the dispatcher. A. That's right.

Q. If you had failed to call the dispatcher or waited at Woodlake prior to May 2nd, you would have had the accident prior to this time. A. Yes, the chances are.

Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake, as the time card and rules required you to, this would not have happened. A. No.

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Q. What caused the accident. A. Two cars collided.

Q. What caused the two cars to collide. A. Because they were on single tracks.

Q. Is there any other reason, Mr. Hunter. A. Because they passed the meeting point.

Q. Who did. A. I did." (R. pps. 147, 148, 149, 150. Also 194 SW 2d Pages 281, 282, 283.)

RESPONDENT'S COUNTER PROPOSITIONS IN ANSWER TO PETITIONER'S SPECIFICATION OF ERRORS

FIRST COUNTER PROPOSITION

The Court did not err in refusing to submit to the jury issues of negligence on the part of the Respondent in failing to provide an automatic block signal device in the sector of the collision. (In answer to Petitioner's First Specification of Error, briefed under point number 1.)

SECOND COUNTER PROPOSITION

The Court did not err in refusing to submit to the jury issues of negligence on the part of Respondent in employing the system it did for the passage of traffic in the sector of the collision. (In answer to Petitioner's Second Specification of Error, briefed under point number 2.)

THIRD COUNTER PROPOSITION

The Court did not err in refusing to submit to the jury issues of negligence on the part of the southbound motorman, in failing to properly slow down his car before reaching the point of collision. (In answer to Petitioner's Specification of Error number 3, briefed under Petitioner's point number 3.)

FOURTH COUNTER PROPOSITION

The Court did not err in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision. (In answer to Petitioner's Fourth Specification of Error, briefed under Petitioner's point number 4.)

THE FIRST BASIC QUESTION

Can the Petitioner recover any damages for personal injuries sustained by him as a result of a collision beteween two of Respondent's interurban cars, which collision was caused solely by Petitioner's negligent violation of the Respondent's rules and positive time card order?

THE SECOND BASIC QUESTION

Can the Petitioner recover under the Federal Employers Liability Act for injuries received by him as the result of

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a head-on collision between two of Respondent's interurban cars, when the jury found and the undisputed evidence conclusively shows that his negligence was the sole proximate cause of Petitioner's injuries?

COUNTER PROPOSITION PRESENTED AND SUMMARY OF THE ARGUMENT

1. There was no error on the part of the Trial Court in refusing to submit to the jury issues of negligence on the part of Respondent in failing to provide an automatic block signal device in the sector of the collision.

(a) There were, in fact, rules of the Company and time card regulations providing for the safe operation of trains in the sector of the collision which, if obeyed by the Petitioner, would have prevented the collision.

(b) There is no statutory duty upon the Respondent requiring the installation of block signals and, in truth and in fact, an Interurban line such as the Respondent is exempt from the installation of such block signals and there is no imputation of negligence from its failure to provide block signals in the sector of the collision.

(c) No imputation of negligence arises even to a steam railway for the failure to intall block signaling devices.

2. There was no error on behalf of the Trial Court in refusing to submit to the jury issues of negligence

on the part of the Respondent in employing the system it did for the passage of traffic in the sector of the collision.

(a) The evidence conclusively evidences the fact that the collision resulting in the inuries to the Petitioner resulted solely from his disobedience of Respondent's reasonable rules and time card instructions.

(b) There was no showing that the time card system which was employed by the Respondent was inadequate.

(c) The interpretation of regulations, rules and instructions promulgated by a railroad for the safety of its employees are not matters for the jury to pass upon, but are matters upon which the Court alone may pass.

(d) The carrier is under no absolute duty to furnish its employees a safe place to perform the duties incident to their employment. It is only under the duty to use ordinary care in providing the employee a safe place to perform the duties incident to his employment.

(e) The carrier having used reasonable care in the promulgation of its rules and time card instructions for the safety of the Petitioner, if obeyed by him, would have provided him a safe place to carry on the duties incident to his employment.

(f) If such rules had been obeyed by the Petitioner this accident would not have happened.

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(g) There was no duty on the railroad company to furnish other, better and later devices or systems, but only to use reasonable care in the providing of such system or devices if such system or devices are reasonable and adequate.

3. There was no error on the part of the Trial Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to slow down or properly apply his air brakes as he approached the point of collision.

(a) The evidence conclusively evidences the fact that the motorman of the southbound Interurban, Maxwell, did everything in his power to prevent the accident, and he did slow down his car and apply his air brakes prior to the collision.

(b) No negligence is shown on the part of the motorman of the southbond Interurban.

4. The Petitioner is not entitled to recover in this case because the collision causing his injuries was caused solely by the Petitioner's negligence, and violation of Respondent's rules and time card order.

(a) Hunter's actions in violating the time card instructions and rules was the sole cause of the accident.

(b) Hunter being solely in charge of the car, and no other person having anything to do with the operation of the car, he and he alone was responsible for the accident.

(c) Hunter is not entitled to recover in this case as a matter of law.

5. The jury having found that Petitioner's negligence was the sole proximate cause of the collision resulting in his injury, he is not entitled to recover.

(a) The right of recovery upon the Federal Employer's Liability Act is predicated upon negligence and not upon injury.

(b) The jury having found, and Petitioner's own testimony disclosing that his negligence was the sole proximate cause of the injury, he is not entitled to recover under the terms of the Act.

FIRST COUNTER PROPOSITION (Restated)

The Court did not err in refusing to submit to the jury issues of negligence on the part of the Respondent in failing to provide an automatic block signal device in the sector of the collision. (In answer to Petitioner's First Specification of Error, briefed under point number 1.)

STATEMENT

The witness, R. P. Hunter, testified that prior to a period of time between 1926 and 1930 there had at one time been a block signal between Woodlake and Denison, but the signal had been taken out, and, for more than twelve years prior to the collision, he had been running a car between

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Denison and Sherman, passing through Woodlake, and no block signal had been in existence during any of said time, and he had not been using or depending upon a block signal for more than twelve years before the accident (R. 67).

The plaintiff's witness, E. S. Burdette, testified that he had been familiar with the line between Denison and Sherman since 1932 and no block signal had been used by the Respondent, and no block signal had been in existence during that period of time (R. 92). The Petitioner testified he had been furnished a time card by the Respondent showing a positive meet with Train No. 15 at Woodlake and that such time card became effective on October 3, 1943, approximately six months before the accident (R. 57 and Defendant's Exhibit No. 1).

The Petitioner himself testified that, if he had stopped at Woodlake, as the time card and rules required him to do, this collision would not have occurred (R. 63-64).

ARGUMENT AND AUTHORITIES

The evidence in this case conclusively establishes the fact that the time card method of operation of its train movements by the Respondent had been satisfactory for at least twelve years prior to the happening of the collision in question. The Petitioner himself had been operating over this same line for twelve years or more under the time card method of operation. If the Petitioner had

only paid attention to the time card, this collision would not have occurred.

Courts will not legislate the method of operation of railroads and the appliances to be installed in connection therewith. This is the duty of Congress. Congress has seen fit to legislate on this very question, on the installation of blocking signals. The Federal law now provides that, after investigation, the Interstate Commerce Commission may require the installation of block signaling devices (see 49 U. S. A. Title 49, Sec. 26), but even this law applying to block signaling devices does not apply to interurban lines. Subdivision (a) of said Section 26 provides, in part, as follows:

> "Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway unless such railway is operated as part of a general steam-railroad system of transportation, but shall not exclude any part of a general steam-railroad system of transportation now or hereafter operated by any other motive power."

There was, therefore, no duty on the part of the Respondent in this case to install automatic block signaling devices by the positive mandate of the law.

The Federal Courts are definitely committed to the rule that there is no implication of negligence in the failure of even a steam railroad to install an automatic block signaling system on its railway.

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The very proposition of negligence for failure to install an automatic block signaling system was squarely before the Court in the case of *Keith vs. Wheeling & L. E. Ry. Co.*, 160 Fed. 2nd 645. In that case, one of the Plaintiff's specifications of negligence was the failure to install a block signaling system and in disposing of this contention, the Circuit Court said:

> "Finally, we think that the District Court was correct in deciding that there was no implication of negligence in the failure of Wheeling to install an automatic block system prior to the accident. Title 49 U. S. C. A., Section 26(b)."

It is, therefore, submitted that there can be no implication of negligence in this case on the part of the Respondent for its failure to install and maintain a block signaling device in the sector of the collision. It is, therefore, submitted that, under the evidence and the record in this case, the Court did not err in refusing to submit to the jury questions of negligence on the part of the Respondent in its failure to install automatic block signaling devices in the sector of the collision.

SECOND COUNTER PROPOSITION (Restated)

The Court did not err in refusing to submit to the jury issues of negligence on the part of Respondent in employing the system it did for the passage of traffic in the sector of the collision. (In answer to Petitioner's Second Specification of Error, briefed under point number 2.)

STATEMENT

The Petitioner testified, without contradiction, that he had been furnished a time card by the Company; that the rules of the Company required that he have this time card with him at all times; that, on the occasion in question, he did have such time card; and that the same was hanging on a hook right in front of him where he could see it at all times (R. 57). The time card showed he was to meet Train No. 15 at Woodlake (R. 61). He was supposed to stay at Woodlake until No. 15 showed up, or call the dispatcher (R.61). He did not wait for No. 15 or call the dispatcher (R. 61). He did not wait at Woodlake, as the time card required him to do (R. 61). He passed the meeting point and met No. 15 down on the curve (R. 61-52). It was his duty, under the rules of the Company, not only to meet No. 15 at Woodlake, but to ascertain if the No. 15 was displayed on the train order box and whether or not that train was carrying signals. This was a positive rule of the Company that had been in effect and had been obeyed by the Petitioner for more than thirty years (R. 59).

To quote his own words:

"Q. In other words, you disregarded the rules and didn't ascertain whether or not he was carrying signals?

A. It is like I said.

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Q. You didn't ascertain that that man had classification signal or car classification?

A. No." (R.59)

The time card under which Petitioner was working at the time is marked Defendant's Exhibit 1 and became effective October 3, 1943, about six months before the accident (Defendant's Exhibit 1, R. 146a). A time card meet is a meeting point set out in the time card and is a positive meet (R. 56). The only time the Petitioner had failed to stop at Woodlake, as he was required to do by the time card, during the six months period in which the time card had been in effect was the date the accident happened. If he had failed to have called the dispatcher, or waited at Woodlake, this accident would have happened before (R. 63). To quote his own words:

"Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake, as the time card and rules required you to do, this would not have happened?

A. No." (R. 63-64)

ARGUMENT AND AUTHORITIES

Since the Petitioner has not favored us, or the Court, with a statement under this point number 2, we are more or less at a loss to definitely ascertain what his complaint might be. However, as we understand the Petitioner's point of error number 2, he is complaining of the refusal of the trial Court to let the jury pass upon the adequacy

of the time card system of operation and the rules of the Company concerning the manner of operation of their cars.

We feel called upon at this time to challenge certain statements made by the Petitioner in his argument, as follows:

1. He states that there should have been more than one man on the car because of increase in traffic—no issue was requested in the trial Court inquiring whether or not the Respondent failed to provide a sufficient number of men to do the work required, and whether such negligence was a proximate cause. He certainly cannot now complain of any failure on the part of the trial Court to submit such issue. The record shows conclusively, however, that the practice of using one man cars had been in effect since 1932 and was nothing new (R. 55).

2. For the first time, it is intimated in Petitioner's argument under this point that there might have been a car in the Woodlake siding. This is just not true, as the record will reflect. The Petitioner himself positively testified that he thought he saw number 15 in the passing track (R. 62). If there had been an extra in the passing track, he would have gone on down and hit number 15 any way (R. 62).

To quote his own words concerning what he saw or did not see at Woodlake, the record reflects the following:

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"Q. When you got there, would you see whether or not he was there?

A. I rode up and stopped.

Q. Was there anything to confuse you in that—
Gullett: We object to the leading.

Woodrow: Was there anything there when you looked to see whether this car was there?

A. Yes, Sir.

Q. That you could have seen?

A. There was a telephone booth.

Q. What color was it?

A. Yellow.

Q. About the same color as these cars?

Gullett: We object to the leading and suggesting.

Woodrow: Was there any similarity of the color of that and the construction of what the company had there?

A. It was similar." (R. 73-74)

The only case cited by the Petitioner under this point is the case of *Lavender vs. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 Sup. Ct. 740. This case is easily distinguishable from the case at bar, in that, in the Lavender case, an employee was killed either by being hit by a mail hook or by an outsider for the purpose of robbery. The Court in that case merely held that the jury could draw such inferences as was logical to it from the testimony as it saw

fit, regardless of any other conclusion or conclusions to the contrary.

In this case, we have a man who, for some reason wholly unexplained by him, violated every known rule, regulation and time card instruction of the Respondent and, by such violation, caused a head-on collision. We fail to see the similarity in these two cases.

In this case the rules of the Company and the time card method of operation were reasonable and easily understandable. In fact, the Petitioner himself had worked under them for more than thirty years. In truth and in fact the Court of Civil Appeals of Texas correctly summed up this proposition, as follows:

> "There was no proof whatever that the time card system was inadequate, * * *" (R. 152)

The interpretation of regulations, rules and instructions promulgated by a railroad company are not matters to be passed upon by juries. If this was true, the method of operation of railroads would be left wholly to the whims and caprices of juries. The Federal Courts are definitely committed to the proposition that the interpretation of rules of railroad companies, where the same are reasonable and understandable, are not matters for the consideration of juries. In the case of *Great Northern Ry. Co. vs. Hooker*, 170 Federal 154, this very proposition is laid down by Judge Van Devanter, at page 159, as follows:

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"The trial court treated the interpretation of the rules prescribing the plaintiff's duty in the premises as a question of fact to be determined by the jury. But we are of opinion that it was a question of law to be determined by the court. Not only were the rules in the nature of a written instrument, but they contained no terms the meaning of which was not made plain by them; and, this being so, effect should have been given to the general rule that the interpretation of a written instrument rests with court, and not with the jury. Bellv. Bruen, 1 How. 169, 183, 11 L. Ed. 89; Goddard v. Foster, 17 Wall. 123, 143, 21 L. Ed. 589; Higgins vs. McCrea, 116 U. S. 671, 682, 6. Sup. Ct. 557, 29 L. Ed. 764; Scanlon vs. Hodges, 52 Fed. 354, 3 C. C. A. 113; Bowes vs. Shand, L. R. 2 App. Cas. 455 1 Labatt, Master and Severtant, Sec. 215. Moreover, it is held by this court that the reasonableness of such rules is to be determined by the court as a question of law, and not by the jury as a question of fact. Kansas, etc., Co. vs. Dye, 70 Fed. 24, 16 C. C. A. 604; Little Rock, etc., Co. vs. Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349. See, also, Scott vs. Eastern Ry. Co., 90 Minn. 135, 140 95 N. W. 892; Bailey's Personal Injuries, Sec. 3325. And it would seem that by analogy a like holding should be made when the question is one of interpretation."

To the same effect see *Chicago R. I. & P. Co. vs. Ship*, 174 Fed. 353. There is no duty upon a railroad company to furnish an employee an *absolutely* safe place to perform the duties incident to his employment. There exists merely the duty to use reasonable care.

The case of *Yazoo & M. V. R. Co. vs. Mullins*, 115 Miss. 343, 76 So. 147, 249 U. S. 531, 63 L. Ed. 754, was a case wherein a flagman was killed apparently trying to catch a train moving out of a station too fast and one of the instructions given by the trial Court was to the effect that an *absolute* duty rested upon the railroad to furnish the deceased with a safe place to perform the duties incident to his employment. Judgment was for the plaintiff in the trial Court, and the same was affirmed by the Supreme Court of Mississippi, but, upon writ of error, the Supreme Court of the United States, speaking through Judge Brandeis, reversed the decision of the Supreme Court of Mississippi and stated as follows, using the following language:

> "But the trial court also instructed the jury that 'it was the absolute duty of the defendant to furnish the deceased with a safe place to perform the duties incident to his employment.' It is clear that, under the circumstances of this case, the duty was not an absolute one; there was merely a duty to use reasonable care. Chicago & N. W. R. Co. v. Bower, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. Rep. 624; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915C, 1 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. C. A. 834; Choctaw, O. & G. R. Co. v. Tennessee, 191 U. S. 326, 331, 48 L. Ed. 201, 206, 24 Sup Ct. Rep. 99, 10 Am. Neg. Rep. 240."

Now, in this case, the Respondent did use reasonable care in the promulgation of its rules and time card in-

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structions for the safety of the Petitioner, which if obeyed, provided him a safe place to carry on the duties incident to his employment. If these rules and time card instructions had been obeyed by the Petitioner, the place furnished to carry on his duties incident to his employment would have been a safe one.

Even if there had been in existence some where else on other railroads, or in other locations, other and better methods or appliances or systems, than the rules and time card method of operation used by the Respondent, even in that event, the Respondent could not have been guilty of negligence in employing the method it did, in the absence of a showing as aforesaid that the same were inadequate or unreasonable. This record is as silent as a tomb of any showing that the method employed by the Respondent was not both safe, suitable and reasonable; the fault in this case layed wholly with the Petitioner himself.

As said by this Court in the *Chicago & N. W. R. Co. vs. Bower*, 241, U. S. 470, 60 L. Ed. 1107, at page 1109:

> "The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed 235, 241, 10 Sup Ct.

Rep. 1044; Patton v. Texas & P. R. Co. 179 U. S. 658, 664, 45 L. Ed. 361, 364, 21 Sup. Ct. Rep. 275."

The above was a boiler inspection case and the rule was applied even under the rigid requirements of that Act. The rule above announced was reiterated and followed by this Court in the case of *Baltimore & O. R. Co. vs. Greger*, 166 U. S. 522, 69 L. Ed. 421.

It is, therefore, respectfully submitted that the Respondent could not have been guilty of negligence in employing the system it did for the passage of traffic in the sector of the collision, and the Trial Court did not err in refusing to submit issues concerning the Respondent's negligence in this connection.

THIRD COUNTER PROPOSITION (Restated)

The Court did not err in refusing to submit to the jury issues of negligence on the part of the southbound motorman, in failing to properly slow down his car before reaching the point of collision. (In answer to Petitioner's Specification of Error number 3, briefed under Petitioner's point number 3.)

FOURTH COUNTER PROPOSITION (Restated)

The Court did not err in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision. (In answer to Petitioner's Fourth

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Specification of Error, briefed under Petitioner's point number 4.)

STATEMENT

Since the Petitioner has briefed his points 3 and 4 together, and since the same are similar in nature, Respondent's Counter Propositions 3 and 4 will be briefed together.

The Petitioner has again failed, under these two points, to give us the benefit of any statement, except a small quotation from the record as shown on page 25 of his brief, as follows:

> "I was driving as fast as the car would go (R. 128). I wouldn't swear how fast they would go because they had no speedometers. But I had it wide open. I was on a straight-away track when I saw him and I had it wide open. When I saw Mr. Hunter's car I was on a straight-away track just prior to the time I reached the curve. I had it wide open— the car was going just as fast as I could make it go." (R. 129)

It is true that Maxwell, the motorman on the southbound car, did testify as above, but the Petitioner does not quote the testimony of the witness Maxwell to show what he actually did when he discovered the northbound car coming toward him.

The Court will bear in mind that, under the Petitioner's own testimony, Maxwell was where he was supposed to

be, doing that which he was supposed to be doing at the time he became involved in this accident. We quote Maxwell's testimony concerning what he did at the very time of the collision, as follows:

"Q. When you saw Mr. Hunter's car moving towards you, what did you do?

A. Put the air on, opened the door and jumped.

Q. Was there any other way you could have stopped that car of yours or check its speed?

A. No, that is the way we stop them, with air.

Q. With air brakes?

A. Yes sir.

Q. Did you 'big gun' it like the boys say?

A. Yes sir, I 'big holed' it.

Q. You just threw that thing on all you could and you opened the door and jumped?

A. Yes sir.

Q. All of us may not know what you mean, Mr. Maxwell, when you say you 'big holed' it. What do you mean when you say you 'big holed' it?

A. Put the air on in the emergency.

Q. In other words, you put on all the air you had, all the braking power you had?

A. Yes sir.

Q. And that was the emergency?

A. Yes sir, that is right.

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Q. And I believe among railroaders and interurban operators when you say you big hole it that means you put it all on?

A. Yes sir.

Q. Is that all the braking power you had?

A. Yes sir.

Q. Was that all the braking power on that car on that occasion?

A. Yes.

Q. Did you big hole it immediately upon seeing that you were approaching his car and he was approaching you?

A. That is right.

Q. I mean, Mr. Hunter?

A. Yes.

Q. Immediately you applied the brakes?

A. Yes sir.

Q. When I say you applied the brakes I mean what you say when you say that you big holed it?

A. Yes sir.

Q. Mr. Maxwell, what effect does applying the brakes, the emergency, on the car, have on the power, the electric power?

A. On the power?

Q. Yes sir?

A. Well the brakes on the car don't have any effect on the power, on the trolley.

Q. Well at the time you applied the emergency on your car or big holed it, did you do anything with reference to cutting the power?

A. Yes sir, cut off the power.

Q. You cut off the power?

A. Yes, sir. Did you say cut off or turn off?

Q. Did you cut it off or turn it off?

A. Turn it off with the controller.

Q. And you did that on that occasion?

A. Yes sir.

Q. At approximately the same time that you applied the emergency?

A. Yes sir, I applied the emergency air brakes." (R. 129-131)

ARGUMENT AND AUTHORITIES

At the outset may we invite the Court's attention to its own definition of negligence in *Tiller vs. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 66 S. Ct. 444:

> "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done."

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We submit that the above quoted verbatim statement of Maxwell shows that he did everything in his own power to avoid this collision that it was humanly possible for him to do—he cut off the power—reversed the car—and set the air in emergency. It is submitted that he, Maxwell, exercised due care under the circumstances. He did that which a reasonably prudent man would have done under similar circumstances of the situation. He did nothing that a reasonable person, under the circumstances, would not have done. He certainly used all of the means at hand to properly slow down his car before reaching the point of collision and certainly applied his air brakes as he approached the point of the collision. He was not guilty of any negligence, and there was no submissible issue of negligence under Petitioner's point 3 and 4. A plaintiff cannot just allege negligence under the Federal Employers Liability Act and not prove it. It is, therefore, submitted that the trial Court did not err in refusing to submit issues of negligence under Petitioner's points 3 and 4.

It having been demonstrated that the Petitioner was not, under the record and the law in this case, entitled to the submission of any of the complained issues of negligence, it is, therefore, the position of the Respondent there is nothing further for the Court to review, since the liability of the Respondent is predicated upon negligence. See *Tiller vs. Atlantic Coast Line R. Co.*, supra. The Respon-

dent is not an insurer of the safety of its employees. See *Tiller vs. Atlantic Coast R. Line Co.*, supra.

However, in view of the statements made by the Petitioner in his behalf, the Respondent submits the following two basic questions for the consideration of the Court.

THE FIRST BASIC QUESTION RESTATED

Can the Petitioner recover any damages for personal injuries sustained by him as a result of a collision between two of Respondent's interurban cars, which collision was caused solely by Petitioner's negligent violation of the Respondent's rules and positive time card order?

STATEMENT

The facts in this case are correctly, fairly, and impartially stated in the opinion of the Court of Civil Appeals, and for the sake of brevity the Respondent will not attempt to reiterate this entire transaction. The Petitioner's own testimony discloses that had he waited at Woodlake as the time card and the rules of the Company required him to do, this accident would not have happened. On the occasion in question, he was proceeding on Train No. 58 in a northerly direction and Train No. 15 operated by Motorman Maxwell was proceeding in a southerly direction. To quote his own words:

> "Q. Now, No. 15 was coming along in a southerly direction. That is where he is supposed to be.

A. Yes.

Q. At that time, you were supposed to be waiting back at Woodlake?

A. Yes, sir.

Q. And you didn't wait for him at Woodlake as the time card required you to?

A. I didn't, no.

Q. And you passed the meeting point and met him down at the curve.

A. Yes, sir." (R. 61 and 62)

He further testified:

"Q. During all that time, you had been following this regular schedule that you outlined to the jury, leaving Sherman at those various times?

A. Yes, sir.

Q. This is the only time in the six months period that you failed to stop and wait for No. 15 at Woodlake, or call the dispatcher?

A. That's right.

Q. If you had failed to call the dispatcher or wait at Woodlake prior to May the 2nd, you would have had the accident prior to this time?

A. Yes, sir, the chances are.

Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake as the time card and rules required you to do, this would not have happened?

A. No." (R. 63)

He further testified:

"Q. What caused the accident?

A. Two cars collided.

Q. What caused the two cars to collide?

A. Because they were on a single track.

Q. Is there an other reason, Mr. Hunter?

A. Because they passed the meeting point.

Q. Who did?

A. I did." (R. 66)

ARGUMENT AND AUTHORITIES

The Petitioner, R. P. Hunter, at the time of the collision in question was operating an interurban car. He was solely in charge of the car. No other person was responsible for living up to and obeying the rules, regulations and time card instructions of the Company. The responsibility for this unfortunate accident rests solely upon the shoulders of R. P. Hunter. He violated every known instruction and duty that he owed not only to himself and to the Respondent but to the passengers on his car. He just did not do that which he was commanded, required and was his duty to do.

It is fundamental, and a citation of authorities is not necessary on the basic difference between assumed risk and negligence or contributory negligence.

The basic difference being "assumed risk is predicated upon contract. Negligence or contributory negligence is predicated upon conduct."

It is exceedingly difficult under some circumstance to distinguish between these two concepts, for the reason that the same have been used interchangeably by the courts, and one has been woven more or less into the other. The recent trend of the Federal Employers' Liability Act cases, beginning with the case of *Tiller vs. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, that certain factors of the doctrine of assumption of risk were eliminated by the 1939 Amendment. All of the cases cited by the Petitioner in his brief seemed to bear out this contention. However, where the employee himself was solely responsible for an accident, we think that the correct construction of the so-called 1939 Amendment is given by the federal courts in the case of *Willis vs. Pennsylvania Railroad Company*, 122 Fed. (2d) 248 (Writ of Certiorari denied), 314 U. S. 684, 86 L. Ed. 547, as follows:

> "If the testimony of Donofrio and Myers is believed, Willis' neglect of his personal duty to act as watchman was the sole cause of his death. In such circumstances his executrix can have no recovery under the Act. Great Northern Ry. v. Wiles, 240 U.S. 444, 36 S. Ct. 406, 60 L. Ed. 732; Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; Unadilla Ry. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; Blunt v. Pennsylvania R. Co., 6 Cir., 9 F. 2d 395; Unadilla Valley Ry. Co. v. Dibble, 2 Cir., 31

> F. 2d 239. The recent amendment, 45 U. S. C. A. Sec. 54, excluding as a defence assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault."

We further think that the correct rule, in so far as this case is concerned, was laid down by Justice Frankfurter in the *Tiller vs. Atlantic Coast Line R. Co.*, supra. as follows:

> "By specific provisions in the Federal Employers' Liability Act, it has swept away 'assumption of risk' as a defense once negligence is established. But it has left undisturbed the other meaning of 'assumption of risk,' namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent."

Quoting further from the concurring opinion by Justice Frankfurter in the *Tiller vs. Atlantic Coast Line R. Co.*, supra:

> "To be sure, this decision (referring to Chesapeake & O. R. Co. v. Nixon, 271 U. S. 218, 70 L. Ed. 914, 46 S. Ct. 495) was made prior to the 1939 amendment, but in this respect that enactment makes no change in the law. The basis of an action under the Act remains the carrier's negligence. The carrier is not to be relieved from the consequences of its negligence by any claim that the employee 'assumed the risk' of its negligence. But neither is the carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—

> risks which cannot be eliminated through the carrier's exercise of reasonable care."

We do not think it was the intention of Congress by the enactment of this provision to overthrow those cases in which an employee himself was solely at fault as was Hunter in this case. In every case cited by the Petitioner and in every case we have been able to find, construing the so-called 1939 amendment to the Federal Employers' Liability Act, there has been more than one actor in the drama whose negligence could have contributed to the accident; but in this case, we have only one actor, R. P. Hunter himself. This actor, R. P. Hunter, disregarded a specific rule and standing time card instruction promulgated for his own safety. We think the correct rule nas been recently laid down by the court in the *Chigago, St. P., M and O. R. Co. vs. Arnold*, 160 Fed. (2d) 1002. In this case, the plaintiff Arnold was injured as a result of an accident involving cars without sufficient clearance. The testimony was conflicting as to the actual occurrence and what had transpired immediately prior to the occurrence. A fellow employee testified in the case that he gave Arnold a specific warning and instruction not to do what which he did. One of the rules of the company required that cars should not be placed upon side tracks or adjoining tracks without proper clearance, and the Circuit Court laid down the following ruling:

> "Liability arises from negligence not from injury under this Act (Federal Employers' Liability Act).

And that negligence must be the cause of the injury. Brady v. Southern R. Co., 320 U. S. 476, 484, 64 S. Ct. 233, 236, 88 L. Ed. 239. In the following cases arising under the Federal Employers' Liability Act it is held that a servant's disregard of a specific order or of a standing rule promulgated for his safety bars recovery, though the injury of the employee was due as well to the negligence of other employees of the railway company. Pere Marquette R. Co. v. Haskins, 6 Cir., 62 F. (2d) 806, 8067; Southern R. Co. v. Hylton, 6 Cir., 37 F. 2d 843, 845; Hylton v. Southern R. Co. 6 Cir., 87 F. 2d 303,395; Louisville & N. R. Co. v. Davis, 6 Cir., 75 F. 2d 849, 851, certiorari denied 296 U. S. 603, 56 S. Ct. 119, 80 L. Ed. 4227; Paster v. Pennsylvania R. R. Co., 2 Cir. 43 F. 2d. 908, 910; Atchison, T. & S. F. R. Co. v. Ballard, 5 Cir., 108 F. 2d 768, 771; Van Derveer v. Delaware, L & W R. Co., 2 Cir., 84 F. 2d 979, 981; and see Rocco v. Lehigh Valley R. Co., 288 U. S. 275, 279, 53 S. Ct. 343, 77 L. Ed. 743; Great Northern R. Co. v. Wiles, 240 U. S. 444, 448, 36 S. Ct. 406, 60 L. Ed. 732. In Van Derveer v. Delaware, L. & W. R. Co., supra, page 981 of 84 F. 2d, the opinions of the Supreme Court frequently cited as sustaining the rule stated are analyzed, and the conclusion is reached that of the injured employee has contributed to his injury by the violation of a rule or express instruction he cannot recover."

We are still of the opinion that there is no change in the law in so far as the facts in this particular case are concerned, and that rules laid down by this court in the following cases hold that the violation or disobedience of

a rule without any excuse was the sole procuring cause or the sole proximate cause of the injury or death of such employee:

Brady vs. Southern Railway Company, 88 L. Ed. 239, 320 U. S. 476, 64 Sup. Ct. 232;

Davis vs. Kennedy, 69 L. Ed. 212, 266 U. S. 147, 45 Sup. Ct. 33;

Southern Railway Company vs. Dantzler, 76 L. Ed. 1127, 286 U. S. 318, 52 S. Ct. 520;

Southern Railway Company vs. Youngblood, 76 L. Ed. 1124, 286 U. S. 313, 52 S. Ct. 518;

Unavilla Valley Railway Company vs. Caldine, 73 L. Ed. 224, 278 U. S. 139, 49 Sup. Ct. 91.

In the Caldine case, supra, the employee of the railroad violated his positive written orders, just as the petitioner, Hunter did in this case. Instead of waiting for a train he was supposed to wait for, he disobeyed the order, the purpose of which was to prevent a collision. He without any excuse for disobeying it pulled out on the main line and was killed. (In this case, Hunter disobeyed his order in failing to wait for Train No. 15 at Woodlake) And in passing upon this very point, this court in an opinion by Mr. Justice Holmes made the following statement:

"It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad

company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

The Petitioner in his brief seems to seize upon the case of *Keith vs. Wheeling & L. E. Ry. Co., et al*, 160 Fed. (2d) 654. There is no resemblance whatever in this case and the Keith case, for the reason that in the Keith case there was an equal responsibility between the pilot and the engineer and the fact that the order was overlooked placed joint responsibility upon them. Certainly, if the engineer and pilot were both negligent, then it would have been the duty of the jury to have apportioned the negligence between them under the terms and conditions of the Federal Employers' Liability Act. But in this case there was no equal responsibility. The responsibility was Hunter's and Hunter's alone.

It is respectfully submitted that the carrier cannot be held responsible in cases of this kind for injuries arising from the employee's own fault and which cannot be eliminated though the railroad exercises reasonable care.

It is respectfully submitted that in this case the railroad exercised every reasonable care for the protection of R. P. Hunter, and he of his own volition brought about a condition which made his position precarious with the resulting injuries to himself.

It is therefore respectfully submitted that Basic Question No. One should be answered in the negative.

THE SECOND BASIC QUESTION RESTATED

Can the Petitioner recover under the Federal Employers' Liability Act for injuries received by him as the result of a head-on collision between two of the Respondent's interurban cars, when the jury found and the undisputed evidence conclusively shows that his negligence was the sole proximate cause of Petitioner's injuries?

STATEMENT

The trial court submitted this case to the jury under proper instructions and under proper interrogatories embracing the doctrine of imminent or discovered peril. (R. 23, 24, 25, and 26)

The jury found against the Petitioner on the so-called doctrine of discovered peril. (R. 28)

The court then submitted to the jury the following interrogatory:

"Do you find from a preponderance of the evidence that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the southbound interurban car upon the occasion in question was the sole proximate cause of the injuries, if any, he received?

ANSWER: Yes or no." (R. 27)

The jury answered the foregoing interrogatory "Yes." (R. 30)

The jury therefore found that R. P. Hunter's negligence was the sole proximate cause of his injuries.

The Respondent adopts its statement under its First Basic Question as an additional statement under this basic question.

ARGUMENT AND AUTHORITIES

The Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, 10 F. C. A. Title 45, Sec. 51, provides that every carrier by railroad shall be liable in damages to the person suffering such damages, etc., resulting in whole or in part from the negligence of the carrier, of the officers, agents or employees of such carrier. It was therefore necessary that R. P. Hunter show to the jury that his injuries were caused in whole or in part by the negligence of the railway company or some of its officers or employees.

It was further necessary that R. P. Hunter show to the satisfaction of the jury that such negligence was a proximate cause of his injuries. See *Lang vs. New York Central R. Co.*, 255 U.S. 455, 65 L. Ed. 729, 41 S. Ct. 381.

In *Tiller vs. Atlantic Coast Line*, 218 U. S. 54, 87 L. Ed. 610, it is stated:

> "In order to recover under the Federal Employers' Liability Act, it was encumbent upon the Petitioner to prove that the Respondent was negligent and that such negligent was the proximate cause in whole or in part of the fatal accident."

It is elementary, of course, that if Hunter's negligence was the sole proximate cause of his injuries, no negligence on the part of the railway company could have been a proximate cause; and since the jury did find that Hunter's negligence was the sole proximate cause of his injuries, since he was wholly at fault, he cannot recover under the Federal Employers' Liability Act.

On the proposition of the employee's negligence being the sole proximate cause of the citation of authorities is unnecessary, it being fundamental. However, the Court's attention is respectfully invited to the case of *Jessionowski vs. Boston & Maine Railroad Company*, 91 L. Ed. 355 (Advance Sheet5), decided January 13, 1947, wherein this court put its stamp of approval on an instruction given by the trial court reading as follows:

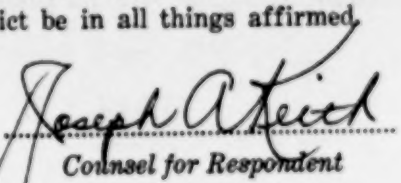
> "Of course, if the deceased's negligence was the sole cause of the accident the plaintiff here cannot recover."

Since the jury found that Hunter's negligence was the sole proximate cause of his injuries, he cannot recover in this case for the reason that to allow him a recovery would make the Respondent an insurer of safety of its employees, and it has never been the intention of the law to make the Respondent such. The rule is very tersely stated in the case of *Whelock vs. Freiwald* (C. C. A. 8th) 66 Fed. (2d) 694, as follows:

> "(1) The Federal Employers' Liability Act does not make an employer an insurer of the safety of its employees, but to entitle plaintiff to recover the defendants must have been guilty of some act of negligence which was the proximate cause of Freiwald's death. Baltimore & O. R. Co. v. Berry, 286 U. S. 272, 52 S. Ct. 510, 76 L. Ed. 1098; Atchison, T & S. C. R. Co. v. Toops, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896; Coyne v. Union Pac. R. Co., 133 U. S. 370, 10 S. Ct. 33 L. E. 651; Reese v. Philadelphia & B. R. Co., 239 U. S. 463, 36 S. Ct. 134, 60 L. Ed. 384."

Since the Federal Employers' Liability Act denies the plaintiff, R. P. Hunter, a recovery when his negligence was the sole proximate cause of his injuries, it is respectfully submitted that Basic Question No. Two should be answered in the negative.

WHEREFORE, the Respondent prays that the judgment of the Court of Civil Appeals for the Third Supreme Judicial District be in all things affirmed.



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Contemporaneously with the mailing of this brief to the Clerk of the Supreme Court of the United States, a copy of this brief has been furnished to Mr. Spearman Webb and Mr. F. Neilson Rogers of Sherman, Texas, Counsel for the Petitioner.

No. 18. HUNTER *v.* TEXAS ELECTRIC RAILWAY CO. Certiorari, 330 U. S. 817, to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. Argued October 15, 1947. Decided November 24, 1947. *Per Curiam:* The judgment is affirmed. Dissenting: MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE. *Ralph Elliott* argued the cause for petitioner. *Spearman Webb* and *F. Neilson Rogers* filed a brief for petitioner. *Alexander Gullett* argued the cause for respondent. *Joseph A. Keith* filed a brief for respondent. Reported below: 194 S. W. 2d 281.